(24,655)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 100.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

L. P. McLAUGHLIN.

IN ERROR TO THE CIRCUIT COURT OF POCAHONTAS COUNTY, STATE OF WEST VIRGINIA.

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1 UNITED STATES OF AMERICA, *ss:*

To L. P. McLaughlin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Pocahontas County, State of West Virginia, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this twenty-fifth day of February, in the year of our Lord one thousand nine hundred and fifteen.

EDWARD D. WHITE,
Chief Justice of the United States.

2 On this 17th day of March, in the year of our Lord one thousand nine hundred and Fifteen, personally appeared before me, the subscriber, E. W. Cochean, Dep. Sheriff, of Pocahontas, County, West Virginia, and makes oath that he delivered a true copy of the within citation to the within named L. P. McLaughlin, in person, on the 13th day of March, 1915, in Pocahontas County, West Virginia.

Sworn to and subscribed the 17th day of March, A. D. 1915.

[Seal of Geo. W. Sharp, Notary Public, Pocahontas County, W. Va.]

GEORGE W. SHARP, *N. P.*

My Commission Expires April 5, 1919.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the Circuit Court of Pocahontas County, State of West Virginia, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between L. P. McLaughlin, plaintiff, and The Chesapeake & Ohio Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United

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ica; all of which will more fully appear in detail from the assignment of errors presented herewith and filed herein.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Circuit Court of Pocahontas County, West Virginia, to the end that the record in said matter may be removed into the Supreme Court
8 of the United States and the error complained of may be examined and corrected, and the said judgment reversed;

And your petitioner will ever pray.

F. B. ENSLOW,
HERBERT FITZPATRICK,
Attorneys for The Chesapeake & Ohio Railway Company, a Corporation.

9 [Endorsed:] L. P. McLaughlin vs. The Chesapeake & Ohio Railway Company. Petition for Writ of Error. Enslow, Fitzpatrick, Alderson & Baker, Attorneys and Counsellors at Law, Huntington, Charleston, West Virginia.

10 In the Supreme Court of the United States.

No. —.

L. P. McLAUGHLIN, Plaintiff Below, Defendant in Error,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant Below, Plaintiff in Error.

And now, before the Justices of the Supreme Court of the United States of America, at the Capitol, in the City of Washington, comes the plaintiff, The Chesapeake & Ohio Railway Company, plaintiff in error, by its counsel, in the above-stated case, and assigning errors therein, says:

That in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

First. The Court erred in refusing to direct a judgment for the defendant in this case, thereby denying effect to the general purpose and to the specific provisions of the Interstate Commerce Acts, and especially the amendment of June 29, 1906, known as the Carmack Amendment, thereby depriving the defendant of the rights secured thereunder.

Second. The Court erred in instructing the jury as follows:

"No 3—The Court instructs the jury that the requirement as to making claim for damages within the time and in the manner specified may be waived by failing to object to the form of a defective notice or by entertaining and proceeding to consider and negotiate with reference to the claim, and a substantial compliance
11 with the stipulation is all that is required."

thereby denying effect to the general purpose and to the specific

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provisions of the Interstate Commerce Acts and particularly the Amendment of June 29, 1906, and depriving the defendant of the rights secured thereby.

Third. The Court erred in holding that the provisions of the uniform live-stock contract introduced in testimony in this case, duly filed by the plaintiff in error before the Interstate Commerce Commission, could be waived by the defendant, or by an agent of the defendant, thereby denying to the defendant the rights secured to it under the Interstate Commerce Act, and particularly under the Amendment thereto of June 29, 1906.

Fourth. For other reasons apparent upon the face of the record.

Wherefore the said The Chesapeake & Ohio Railway Company, a corporation, prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to the rights of which it has been deprived by the said decision.

F. B. ENSLOW,
HERBERT FITPATRICK,
Attorneys for The Chesapeake & Ohio Railway Company, a Corporation.

12 [Endorsed:] L. P. McLaughlin vs. The Chesapeake & Ohio Railway Company. Assignment of Errors. Enslow, Fitz-Patrick, Alderson & Baker, Attorneys and Counsellors at Law, Huntington, Charleston, West Virginia.

13 Enslow, Fitzpatrick & Baker. Received Jan. 9 1915, Huntington, W. Va.

RECORD.

STATE OF WEST VIRGINIA:

Pleas Before the Judge of the Circuit Court of Pocahontas County, West Virginia, on the 4th Day of December, 1914.

"Transcript of the Justice."

L. P. MCLAUGHLIN, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant.

STATE OF WEST VIRGINIA,
County of Pocahontas, To wit:

In a civil action before F. T. Larew a Justice of the Peace for said County, District of Little Levels, State of West Virginia, the 13th day of March, 1914, the plaintiff by his attorney, L. P. McLaughlin, files a claim for $100.00 summons issued on the 13th day of March, 1914. Returnable on the 21st day of March, 1914 at 1 o'clock P. M., and placed in the hands of R. K. Burns C. P. C. Date 3-21-1914.

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Summons returned endorsed as follows, to-wit: Executed the within and hereto annexed writ in Pocahontas County, West Virginia, this 14th day of March, 1914, at 2:45 o'clock, P. M. as to the said Chesapeake & Ohio Railway Company, a corporation, by delivering a true copy thereof to J. C. Harris, General Agent of said Chesapeake and Ohio Railway Co., a corporation, at Marlinton, at
14 its principal office or place of business of said corporation at Marlinton, in Pocahontas County, West Virginia, at the time of such service the President, Cashier, Treasurer or other cheif officers of said corporation not being found there or in said County.

R. K. BURNS, *C. P. C.*

March 21, 1914.—Summons returned executed as above. And plaintiff present and ready for trial and the defendant not being present we waited one hour and the defendant still failed to appear and the plaintiff proved his a/c, and judgment is rendered that the plaintiff recover of the defendant the sum of $100.00 with interest from this date and costs which now amount to $3.70.

Given under my hand this 21st day of March, 1914.

F. T. LAREW, *J. P.*

March 26th, 1914.—Appealed by the Chesapeake & Ohio Railway Company, a corporation. Said Chesapeake & Ohio Railway Company giving bond for $200.00 with the National Surety Company, as surety.

I, F. T. Larew, do hereby certify the above is a true copy of my docket.

F. T. LAREW, *J. P.*

15 *Account.*

Chesapeake & Ohio Railway Company to L. P. McLaughlin:

1914.

February, —. To damages to one horse shipped in C. & O. Car No. 3013, from Lexington, Ky., to Seebert, West Virginia, on the 13th of February, 1914, arriving at destination, February 17th, 1914..... $100.00

16 *Special Plea.*

L. P. McLAUGHLIN
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation.

On Appeal.

And now comes the defendant and for Special Plea in its behalf says that the plaintiff ought not to have and maintain his said action

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because it is a carrier engaged in interstate commerce and operating a railroad through the States of Virginia, West Virginia and Kentucky; that the shipment for the alleged damage and loss *to* which this suit was brought, originated on The Chesapeake & Ohio Railway at Lexington, Kentucky, on or about the 13th day of February, 1914, shipped by L. P. McLaughlin, consigned to L. P. McLaughlin, Seebert, West Virginia.

The defendant says that the shipment in question being an interstate shipment is subject to the constitutional power of Congress to regulate commerce amoung the States and with foreign nations, and that Congress has by an act passed on the 4th day of February, 1887, as amended by the Act of June 29th 1906, regulated commerce between the States and has conferred upon the Interstate Commerce Commissione*r* certain powers and duries; that acting under the said Acts and in accordance with the rules and duties prescribed by the Interstate Commerce Commission, the Chesapeake & Ohio Railway Company, being the Railway Company over whose lines of railroad this shipment moved and the defendant herein adopted certain uniform Live-stock contracts, and such Live-stock contracts adopted by it were filed with and approved by the Interstate Commerce Commission, as it is required so to approve.

17 That on the uniform Live-stock Contract so adopted, there is the following provision:

"That no claim for da-ages which may accrue to the said shipped under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless claim for such loss or damages shall be made in writing verified by the affidavit of the said shipped or his agent and delivered to the General Claim Agent of the said carrier at his office in Richmond, Va., with- five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liab*el* unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

That in this case the uniform Live-stock Contract issued for this particular shipment was this form of said Live-stock Contract and contained this provision, and the defendant says that the plaintiff did not comply with this provision and did not file his claim within five days after said stock was removed from the car, and this uniform live-stock contract having been fi*l*ed with the tariffs of the Railway Company, with the Interstate Commerce Commission and it having been approved by the said Interstate Commerce Commission with this provision in it, that the provision is binding on all carrier- and that it cannot under the Interstate Commerce Law pay *o*f settle any claims unless the claims have been filed within the five days' period as is provided by the condition of the Live-stock contract in this case, as appears from duly certified copy thereof filed with the plea as a part thereof, and has no authority to disregard this provisicn, and if it should disregard this provision, it would be violating

18 the laws of the United States and the ruling of the Interstate Commerce Commission, which — it *is* were permitted to do would lead to gross, unjust and wide-spread discrimination.

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Defendant further says that the shipment involved in this suit being interstate traffic is subject solely to the regulations prescribed by Congress and the rules of the Interstate Commerce Commission as authorized by Congress, and this defen-ant is ready to verify.

Wherefore, it prays judgment if the plaintiff ought to have or maintain its aforesaid action thereof against it.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION,
By COUNSEL.

ENSLOW, FITZPATRICK & BAKER,
Attorneys.

STATE OF WEST VIRGINIA,
County of Cabell, ss:

Lawrence L. McClure, being duly sworn, says that he is an attorney associated with the firm of Enslow, Fitzpatrick, Alderson & Baker, attorneys for The Chesapeake & Ohio Railway Company, a corporation, in West Virginia, and that he is familiar with the facts and allegations stated in the foregoing plea and that the same are true as he *is* verily believes.

LAWRENCE L. McCLURE.

Taken, sworn to and subscribed before me a Notary Public in and for the State and County aforesaid, this 30th day of June, 1914.

19 My Commission expires Nov. 17th, 1920.

J. WM. HAGEN, JR.,
Notary Public, Cabell County, West Virginia.

20 *Copy of Uniform Live Stock Contract.*

A. F. 234.

The Chesapeake and Ohio Railway Company.

Uniform Live Stock Contract.

———— Station —— —, 191–.

This agreement made this the — day of —— 191– by and between the Chesapeake and Ohio Railway Company, hereinafter called the carrier and ———— (Shipper's name) hereinafter called the shipper.

Witnesseth that the said shipper had delivered to the said carrier, Live stock of the kind and number and consigned and destined by said shipper, as follows:

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Consignee, Destination, Etc.	Number and Description of Stock (Shippers Load & Count).	Weight Subject to Correction.

Advance Charges $ ————————————————————
Car Nos. and Initials ————————————————————

For transportation from ———— to destination, if on the said carrier's line of railroad, otherwise to the place where said Live stock is to be received, by the connecting carriers for transportation, to or toward destination, and that the same has been received by said carrier for itself and on behalf of the connecting carriers for transportation subject to the official tarrif-s, classification and rules of said company and upon the following terms and conditions, which are admitted and *and* accepted by the said shipper as just and reasonable, viz:

That said shipper or consignee is to pay the frieght thereon to the said carrier at the rate of — per —— which is the lower published tariff rate based upon the express condition that the carrier
21 assumes liability on the said Live Stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for, the transportation of the said animals and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carrier or their employee's or otherwise.

If horses or mules—not exceeding One Hundred Dollars each.

If cattle or cows—not exceeding Seventy-five Dollars each.

If fat hogs or fat calves—not exceeding fifteen Dollars each.

If sheep, lambs, stock hogs, stock calves, or other small animals—not exceeding five dollars each.

And in no event shall the carrier liability exceed twelve hundred dollars upon any car load.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation or said Live Stock.

That the said shipper is at his own sole risk and expense to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither the said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except of the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself, that they are sufficiently safe, and in proper order and condition, and said

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carrier or any connecting carrier, shall not be liable on ac-
22 count of any loss or of injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that doors or openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said Car or cars.

The said carrier or any connecting carriers shall not be liable for or on account of any injury sustained by said Live-Stock occasioned by any or either of the following causes, to-wit: Over-loading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw, or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by any changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stop-age of labor, or from causes beyond their control.

That in the event of any unusual delay or detention of said Live Stock caused by the negligence of the said carrier or its employees, or its connecting carrier or their employees, or otherwise, the said shipper agrees to *except* as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for the said stock while so detained.

That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any Court by the said shipper, unless claim for such loss
or damage shall be made in writing, verified by the affidavit
23 of the said shipper or his agent and delivered to the General Claim Agent of the said carrier at his office in Richmond, Va., within five days from the time said stock is removed from said car or cars; and that if any loss or damages occurs upon the line of a connecting carrier then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent or the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract to take cars of the same shall leave the caboose and pass over or along the cars or track of said carrier or of connecting carriers, they shall do so at their own sole risk of personal injury from whatever cause and neither the said carrier or its connecting carriers shall be required to stop or start their trains or caboose cars at or from any depots or platforms, or furnish lights for the accom-odation or safety of the person accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carrier's without charge, other than the sum paid or to be paid for the transportation of Live Stock in his or their charge, that the said shipper shall and will indemnify and save harmless said carrier,

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and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier or any of its or their employees or otherwise.

24 And —— —— (Shippers name) do —— —— (Does or do) hereby acknowledge that —— —— (he or they) had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classification and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad, and transportation companies, as common carriers of the said Live Stock upon their respective roads and lines, but ha— (Has or have) voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By —— ——

Station Agent.

Witness my hand —— ——,

Shipper.

By —— ——,

Shipper's Agent.

—— ——

—— ——

Witness.

25 Interstate Commerce Commission,
Washington.

I, George B. McGinty, Secretary of the Interstate, Commerce Commission, do hereby certify that the paper hereto attached contains a true copy of the Uniform Live Stock Contract appearing on pages 32 and 33 of Official Classification No. 41 R. N. Collyer, Agent L. C. C.—O. C. No. 41; said I. C. C.—O. C. No. 41 having been filed with the said Interstate Uniform Live Stock Contract published in said I. C. C—O. C. No. 41 does not contain the words "The Chesapeake and Ohio Railway Company.

It witness whereof, I have hereunto set my hand and affixed the Seal of said Commission this 20th day of July, A. D. 1914.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

26 In the Circuit Court of Pocahontas County, West Virginia, December Term, 1914.

L. P. McLAUGHLIN, Plaintiff,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant.

Bill of Exception No. 1.

Tried Before the Honorable Charles S. Dice, Judge of the said Circuit Court and a Jury.

Appearances:

Messrs. F. R. Hill and A. P. Edgar, counsel representing the plaintiff.

Mr. Herbert Fitzpatrick, counsel representing the defendant.

Be it remembered that at the trial of this cause, the defendant saved to itself the following exceptions embodied in this Bill, which exceptions to the evidence in the case are included and shown in the evidence hereafter given, which evidence is as follows:

And be it further remembered that after W. S. Coursey, the Court Stenographer, had been sworn to take and report the evidence in this case, the plaintiff and the defendant to maintain the issue, introduced the following evidence, which has been duly transcribed and is now before the Judge, and which is duly certified by said stenographer as the evidence given in said case:

27 Thereupon came Dr. J. D. ARBUCKLE, a witness called upon behalf of the plaintiff, who, being first duly sworn, testified as follows:

Direct examination by Mr. Edgar:

Q. Please state your name and place of residence?

A. Dr. J. D. Arbuckle, and my residence is at Maxwelton, W. Va.

Q. Are you acquainted with the plaintiff in this case, L. P. McLaughlin?

A. Yes, sir.

Q. Please state to the jury where you were on the 13th of February, 1914?

A. Lexington, Kentucky.

Q. What were you doing there?

A. We had bought some horses that day and were loading them.

Q. Was Mr. McLaughlin, the plaintiff in this case, there?

A. Yes, sir.

Q. What horses had you bought and were loading?

A. We had loaded thirteen horses there that day.

Q. State whether or not you assisted in the loading of a horse for L. P. McLaughlin?

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A. Yes—we loaded several horses for him that day.

Q. Will you take the paper here handed you and tell the jury what it is?

A. That was the bill that the agent in Lexington gave me—I signed up as Mr. McLaughlin's agent; I signed up the bills when we loaded the horses.

Q. This was the B/L for the car in which these horses were loaded?

A. Yes.

Q. Please state whether the horses belonging to Mr. Mc-
28 Laughlin were loaded in the car for which this bill was given?

A. Yes; the horses were loaded in that car.

Q. From whom did you receive this bill?

A. From one of the men in the office in Lexington.

Q. In what office?

A. In the freight office.

Q. What freight office?

A. C. & O. Railway.

(Here counsel for plaintiff offers in evidence Uniform Live Stock Contract, marked Exhibit One.)

Q. Did you help load these horses?

A. Yes, sir.

Q. Will you please state to the jury just how they were loaded and how they were situated and fixed in that car.

A. We had one stallion among a lot of horses. We loaded him in one end of the car, and we had two other colts and one of these colts was among them we didn't want to get in with the mares; we boxed this colt off in one end of the car; there was a horse back in the end of the car and this colt was boxed off between that horse and the door.

Q. The McLaughlin horse?

A. Yes. Boxed off between the horse and the end of the car and the door.

Q. Tell the jury how the partitions in the car were constructed?

A. We nailed up pieces on the side of the car and got boards the length of the car and nailed to these pieces and put a stay in the middle to go to the ceiling and nailed it to the floor, so they would not give in the center.

Q. What fort of boards?
29 A. Inch boards; I don't remember what kind of lumber they were.

Q. How high were they?

A. They were up to a man's chin; I always made it a rule to put them up so a horse would not jump over them at all. They were as high as your chin.

Q. Were they substantially built?

A. Yes, sir; they were.

Q. As I understand you, it was in one of these box stalls this horse of McLaughlin's was placed?
A. Yes.
Q. To whom was that car delivered for shipment?
A. To the C. & O. Railway.
Q. By whom was it delivered?
A. By the agent there, I suppose; I billed them out and they picked them up.
Q. Did you see this horse after he was shipped to West Virginia?
A. No, sir; I didn't see him until later; I don't remember; it was a good long time afterwards—I expect a month or six weeks.
Q. What kind of a horse was it?
A. It was an extremely high bred colt, out of Burboun, by Burboun Chief; the dam was by Monte Christo. He was one of the best we saw there.
Q. What was his age?
A. Folded in 1912; late colt; he was a two year old.
Q. How much experience have you had as a horse man?
A. I have had a good deal of experience; I have shipped as high as thirty or forty horses from Kentucky in the last three or four years—maybe not that many,—but colts and all, I suppose so. Other men were with me.
Q. You mentioned that you saw this horse a month or two after he was shipped to Seebert?
A. Yes.
Q. Did you notice any injury about the horse?
A. Yes; he had a very bad leg on him.
Q. Explain to the jury what the character of the injury was?

(To which question the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. He had a very bad place on his hind leg, between the hock and the ankle; a very bad scar; at the time I saw him the skin had sluffed off and the muscles had sluffed off, down to the bone.

(To which answer the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Q. Describe the size of the injury or wound?
A. It looked to me like about five or six inches long,—the main part of the wound.
Q. In your opinion, how much was the horse damaged by that injury?

(To which question the defendant, by counsel, objected, and the Court sustained the objection, to which action and ruling of the Court the plaintiff, by counsel, then and there excepted.)

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31 Q. What was the horse worth before the injury?
A. You could not buy him privately for less than $400.00.

(To which answer the defendant, by counsel, objected, and the Court sustained the objection, to which action and ruling of the Court the plaintiff, by counsel, then and there excepted.)

Q. Answer the question—what was he worth before the injury?
A. You want to know what I think the value of the horse was?
Q. Yes.
A. $400.00.
Q. That is your opinion?
A. Yes.
Q. What, in your opinion, was he worth after the injury?
A. $100.00.
Q. Have you seen the horse recently?
A. No, sir; I have not seen him since the sale.

Cross-examination by Mr. Fitzpatrick:

Q. What relation are you to Mr. McLaughlin?
A. Brother-in-law.
Q. You and he were together at Lexington?
A. Yes.
Q. You were acting as his agent in regard to the shipment?
A. Yes, sir; I had a car load too at the same time.
Q. Who came east with the stock?
A. Nobody.
Q. Shipped it without anybody in charge?
A. Yes.
Q. Was that the only car you shipped?
32 A. No, sir; one other car.
Q. Was this colt a gelding?
A. No; a stallion.
Q. What was he bought for?
A. Breeding purposes.
Q. Is he still living?
A. Yes.
Q. What did Mr. McLaughlin pay for him?
A. I don't remember; I don't remember the exact figures.
Q. Approximately, to the best of your information?
A. I think about $145.00—I don't know certainly; that is as near as I can remember.
Q. When these horses were loaded, were you present?
A. Yes, sir.
Q. Was Mr. McLaughlin present?
A. Yes.
Q. Was the loading done under your direction?
A. We loaded it together; not under my direction any more than his.
Q. How many horses were put in this car?
A. Five, I think.

Q. I notice the B/L shows four horses and one stallion. Is this colt, two years old, the stallion referred to?

A. He was not at the time of the shipment; he was coming two.

Q. Is he the stallion referred to in the B/L?

A. No, sir; there was another stallion, and the colt was covered by the four horses mentioned.

Q. This colt, about which this suit is, was put at one end of the car?

A. No, sir; between the end and the door.

Q. Then there were planks across the car between the colt and the door?

33 A. Yes, sir.

Q. Without taking these planks down, it was not possible to get the colt out to feed and water it, if it was necessary to take him out of the car?

A. No, sir; you could feed and water him in there.

Q. If the colt had to be taken out of the car then, these partitions would have to be taken down?

A. Yes.

Q. How many hours is it from Lexington to Seebert, the point of destination?

A. I don't know. We shipped Friday evening and they got into Seebert Tuesday, I think; I ain't certain, but my horses came into Ronceverte Monday morning, shipped at the same time.

Q. Friday was the 13th?

A. Yes, sir.

Q. That would make them reach Seebert the 17th, Tuesday?

A. I don't know; I cannot say certainly when. My horses came in Monday morning.

Q. Where?

A. At Ronceverte.

Q. Ronceverte is how far from Seebert?

A. 35 miles, I reckon; I don't know certainly.

Q. You don't know then when this particular horse was delivered at Seebert?

A. No, sir.

Q. Were your horses in the same train?

A. Yes, sir.

Q. Were you at Ronceverte when your stock arrived?

A. Yes.

Q. You had come in in advance of the shipment?

33½ A. Yes. But the horses were not in the same train when they got to Ronceverte as mine was. They were in the same train when they left Lexington; I inquired about it at Ronceverte and they said they had laid his horses over at Hinton; mine came in early Monday morning.

Q. Which hind leg was hurt?

A. I would not swear which one it was—I don't remember.

Q. You mean to tell the jury you do not know which leg was injured?

POOR C

A. I would not say certainly; I know it was a hind leg; whether it was the right or the left I would not say.
Q. What part of the leg was it on?
A. It was from the hock to the ankle.
Q. When did you see that horse last?
A. At the sale at Academy in September.
Q. Of this year?
A. Yes, sir.
Q. Was he sold?
A. Yes.
Q. What did he bring?
A. Something over $100,—I don't know exactly what he sold for.
Q. Was the horse still a stallion?
A. Yes, sir.
Q. Do you know whether he had ever been bred?
A. I don't know.
Q. Did the horse, when he was sold in September, limp in the hind leg?
A. No, I don't think he did.
Q. He had recovered entirely from his injury, so far as you could see?
A. No, sir.
34 Q. What was the matter with him?
A. Swelled up that big (showing with hands), and terrible scar there (showing).
Q. This injury that you speak of between the hock and the knee, was it?
A. Yes, sir—the hock and the ankle.
Q. It was about five inches long?
A. Something like that—I didn't measure it; it was a terrible big scar.
Q. At the time you saw him was it healed up?
A. It had healed over and left a scar, tissue.
Q. That was about a month after the shipment?
A. No, sir; that was at the sale; a month after the shipment there was a big raw place—all the muscles had *sluffed* off.
Q. You don't know how he was treated after he arrived at Seebert?
A. No, sir.
Q. Did you know the veterinarian?
A. I heard Mr. Smith treated him.

By the Court:

Q. You pointed on the inside of your leg between the hock and the ankle—was it on the inside of the leg or outside?
A. It was on the inside, as well as I remember; his whole leg was swollen and the scar, as well as I remember, was on the inside of the leg.

Redirect examination by Mr. Edgar:

Q. The sale you speak of was how long after the time the horse was shipped?

A. We bought the horse in February and the sale was in September.

35 Q. Of the same year?

A. Yes.

L. P. McLAUGHLIN, another witness of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. Edgar:

Q. State your name and place of residence?

A. L. P. McLaughlin, and I live at Academy, West Virginia.

Q. What is your occupation?

A. I live on a farm and raise stock.

Q. What relation do you bear to this suit?

A. I owned this horse.

Q. You are the plaintiff in this case?

A. Yes.

Q. Where were you on the 13th of last February?

A. At Lexington, Kentucky.

Q. What was your business there?

A. We went down there at that sale and bought some horses; didn't go specially to buy any, but we bought some.

Q. State whether or not you shipped some horses from Lexington?

A. Yes, we shipped in three cars, I think, altogether—Mr. McNeil, Dr. Arbuckle and myself shipped three cars out Friday.

Q. You owned some of the horses?

A. Yes, sir.

Q. You have brought suit against the Railway Company for damages to one horse shipped in C. & O. 3013, from Lexington, Kentucky, to Seebert, West Virginia, February 13th, 1914, arriving at destination February 17th. Please state whether or not the horse you speak of was one of the horses? Take the paper here

36 handed you and tell the jury what that is?

A. This is a claim I had—the day that the horse was hurt, I asked——

Q. What is that paper?

A. This is the claim we gave to the Railway Company.

Q. What was the amount of it?

A. $100.00.

Q. Is that claim just and correct?

A. Yes, sir.

Q. Were you present when the horses were loaded in this car?

A. Yes, sir.

Q. Please tell the jury how they were loaded and how they were situated in that car?

A. We had five horses and there was one stallion,—two colts coming two years old, two mares, and we put the stallion back *back,*

POOR C

first in the car and then made a stall and put this colt next and put the other two year-old colt in the other end and put up a stall and put the mares in the middle; this colt was right next to the door, on the left—I think it was on the right.

Q. Which colt?

A. This Marcus Chief.

Q. Was this colt in a stall to itself?

A. Yes.

Q. Please state how that stall was constructed?

A. We put pieces up against the car on either side and *and* nailed them, like making a stall, and put a brace in the middle from the roof to the floor.

Q. How high was it?

A. We aimed to make a good stall—Dr. Arbuckle said we ought to make it so they could not reach over, so we made it high.

37 Q. Was this car delivered to the Railway Company in that condition?

A. Yes.

Q. Was that stall safely and substantially constructed?

(To which question the defendant, by counsel, objected, and the Court sustained the objection.)

Q. State how it was constructed?

A. It was planked off—planks across like I said and pieces against the end were nailed. We thought it was secure because we had some right valuable horses——

(To the latter part of witness's answer the defendant, by counsel objected, and the Court sustained the objection.)

Q. How many boards were across there and how wide were they?

A. I could not state positively because I don't remember.

Q. Where was this car delivered to the Company for shipment?

A. At Lexington.

Q. To what point?

A. To Seebert.

Q. When did you see this car again?

A. We saw it Tuesday?

Q. Whereabouts?

A. At Seebert.

Q. This County?

A. Yes.

Q. What day of the month was that?

A. 17th day of February.

Q. What year?

A. 1914.

Q. That was the day the car arrived at Seebert?

38 A. Yes, sir.

Q. State whether or not you helped unload this car at Seebert?

A. Yes.

OPY

Q. What was the condition you found when the car was opened at Seebert?

A. The stallion was all right and the colt on the other side. This colt was in with the mares and the partition we had put up was gone and out halters and blankets were gone.

Q. You speak of the partition being gone?

A. It was out of the car; it was not in the car; there may have been a plank or so, but, as far as I can recollect, I think it was all gone.

Q. Who was there and helped to unload the car.

A. Edgar, my brother, and Mr. Robb, I think, was there.

Q. Who is Mr. Robb?

A. The Agent.

Q. What condition did you find this horse in when you unloaded him?

A. His leg was badly swollen and bruised; it was black, bruised from the hook joint to the pasture joint.

Q. Which leg?

A. Right leg, I think; I would not say.

Q. On the inside or outside?

A. Inside.

Q. Do you know how this horse received that injury?

A. No, I do not.

Q. I will ask you to state what was the condition of that horse when he was put in this car at Lexington?

A. He was all right as far as I could tell, and sound; he was sold to us to be sound, and we brought him right down and put him in the car.

39 (To the latter part of witness's answer the defendant, by counsel objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Q. How many partitions were in this car?

A. Three.

Q. State whether or not the one that was knocked down was constructed like the other two?

A. Yes; they were all alike.

Q. Of the same kind of material?

A. Yes.

Q. How much was this horse worth before he was injured?

A. I could not hardly tell; he was a very well bred horse.

Q. Just state, in your opinion?

A. I bought him to sell; I bought him for that purpose, but I would not have taken less than $225.00 for him.

(To which answer the defendant, by counsel, objected, and the Court sustained the objection.)

Q. Answer the question directly. In your opinion, how much was he worth?

A. He was worth $225.00.

POOR C

Q. How much was he worth after the injury?
A. He sold, at a fair sale, for $110.00.
Q. How was this horse treated after you took him out of the car?
A. I turned him over to a veterinarian, to Dr. M. C. Smith.
Q. How long was he with Dr. Smith?
A. Two months.
Q. What did that cost you?

(To which question the defendant, by counsel, objected,
40 and the Court sustained the objection.)

Q. What was the condition of the horse at the time you sold him in September, 1914?
A. He was still scarred; it had *sluffed* off to the bone and healed and there was still a scar and swollen, still swollen a good deal.
Q. How many months after the shipment was that?
A. It was the 24th day of September he was sold.
Q. During the time intervening, from February to September, 1914, did you use the horse?
A. No, sir.
Q. Why did you not use him?
A. He was an unknown colt for one reason and the other was he was not in condition to use; he had just begun to heal over about a month before he was sold; his leg was sore three weeks or a month before he was sold; it was about an inch wide and between six and eight inches long, clear to the bone; you could see the bone; you had to grow tissue from the bone out and it took a good deal of time.
Q. State whether or not it was possible to go in and feed and water these horses without removing them from the car?
A. Yes, sir; it would have been possible; to have watered the stallion you would have had to have gone through this colt's stall.
Q. State whether or not the other partitions in this car had been destroyed?
A. No, sir; they looked the same as when we put them in; but I could not swear they were the same.
Q. Take the paper here handed you and tell the jury what that is?

A. This is the freight bill I received here at Seebert?
41 Q. For what?
A. For those horses; five horses.
Q. Where did you get it?
A. I got it from the agent at Seebert.
Q. Who?
A. Mr. Robb.
Q. What is his business?
A. Freight agent and depot agent and passenger agent at Seebert.
Q. For whom?
A. For the C. & O. He came there—he said he would go with us to see if it was all right, and he made off this bill for us, the freight bill.
Q. Who wrote that bill?
A. Mr. Robb.

COPY

Q. The Agent?
A. Yes.

(Counsel for plaintiff offers freight bill in evidence, which is marked for identification "Exhibit Two," and reads same to the Court and jury, which is in the words and figures following:

"Freight Bill.

SEEBERT, W. VA., STATION, 2-17-'14.

The C. & O. Lines.

Consignee, L. F. McLaughlin.
Destination, —.
Route, —.

To the Chesapeake and Ohio Railway Co., Dr., for charges on Articles Transported:

42

Way-billed from—	Way-bill date and No.	Full name of shipper.	Car initials and No.
Lexington, Ky.	165/2-12-'14.	L. F. McL.	

Number of packages, articles and marks.	Weight.	Rate.	Freight.	Advances.	Total.
4 Horses.....	8,000	54	43.20		43.20
1 Stallion.....	Feeding				3.50
					46.70

1 horse badly damaged.
Received Payment:**** —— — 191–.

H. A. ROBB, *Agent.*"

Q. Who wrote the words on this bill "One horse badly damaged"?
A. Mr. Robb.
Q. State whether or not you filed any notice with the Railway Company for claim for damages, and, if so, when?
A. 18th day of February, I had that claim written, but I could not swear positively whether it was the 18th or 19th—Mr. Robb told me at the time if I would have a claim written he would send it.
Q. Send it where?
A. To Mr. Scherer, the Agent at Richmond, and I had that fixed either the 18th or 19th and gave it to Mr. Robb to send and on that night he phoned to me and said to send this bill he signed, he would send it on, but I kept this bill and the next day,—it was the 19th or 20th, I gave it to Mr. Larew, and told him to send it to the company.
Q. Who is Mr. Larew?
A. Squire Larew.
Q. What is his business?

POOR CO

A. Justice of the Peace at Academy.
Q. I will ask you to state whether or not this is a copy of the bill you gave to Mr. Robb?
43 A. Yes, sir; I had two.

Counsel for plaintiff here offers in evidence the bill of $100.00 referred to, marked for identification "Exhibit Three."

Cross-examination by Mr. Fitzpatrick:

Q. Which hind leg was hurt?
A. It was the right hind leg, I think.
Q. Do you mean to tell the jury, after having had that horse from February to September, 1914, you do not know which leg was hurt?
A. I would not swear positively which leg it was.
Q. You were present when the horse was loaded?
A. Yes.
Q. What had you given for it?
A. $90.00, at an auction sale.
Q. And sold him for $110?
A. Yes, sir.
Q. After having kept him from February until September?
A. Yes.
Q. Of the same year?
A. Yes. I paid $28.00 Doctor's bill.
Q. You have been notified by the Court that that testimony would not be allowed to go in.

(Counsel for defendant objected to witness's last answer and the Court sustained the objection.)

Q. When did the shipment leave Lexington on the 13th?
A. I don't know; sometime that night.
Q. Did you come with it?
44 A. No, sir.
Q. Were you at Hinton when it arrived there?
A. No, sir.
Q. Were you at Ronceverte when it arrived there?
A. No, sir.
Q. You didn't see it until it arrived at Seebert?
A. No, sir.
Q. Had the horse been broken when you sold it?
A. No; he was broken to lead; he had never been ridden.
Q. He was broken to lead when you got him?
A. Yes, sir.
Q. You have said on the day that the horse was unloaded you were present and Mr. Robb was present?
A. Yes.
Q. When did you turn the horse over to Dr. Smith?
A. I don't recollect; I recall it was the 19th of February; he made one trip before he took him home.
Q. When did he take him home?

COPY

A. I would not state positively, but it was three or four or four or five days after I got him.

Q. What time on the 17th did you unload him?

A. I think between three and four o'clock in the afternoon; we unloaded as soon as the train came.

Q. You turned over to Mr. Robb, the C. & O. agent at Seebert an account such as you have here filed as a part of your testimony, did you?

A. Yes, sir.

Q. That was on the 17th, the day the horse arrived at Seebert?

A. No, sir.

Q. Was it on the 18th?

A. It was either the 18th or 19th; it was the 18th I had
45 this fixed and I either got it to him that day or the next.

Q. On the 19th you turned over a similar paper to the Justice of the Peace?

A. It was the day after; it was the 19th or 20th; it was the day after Mr. Robb phoned to me.

Q. What else did you give the Justice of the Peace besides this account you have filed?

A. Nothing else.

Q. You directed him to forward it to whom?

A. To the Claim Agent.

Q. Were you at that time putting your claim in the hands of Mr. Larew, Justice, for adjustment?

A. Yes, I turned it over to him.

Q. You don't know, except from what Mr. Larew may have told you, what Mr. Larew did after that time?

A. No, sir; I don't know.

Q. You didn't file with the Railway Company any other claim except the one which you have here offered in testimony?

A. No, sir.

Q. The horses, when they arrived at Seebert were in the same condition that they were in when the left Lexington, as far as you could see, except this one colt?

A. Yes, sir.

Q. The place where he had been in the so-called stall was out of the way and he was with the mares?

A. Yes, sir.

Q. Was it possible for the colt to turn around in the stall?

A. Yes, they had two pretty good stalls from the door back and two stalls from the car door back.

Q. Could the colt in the stall built for him turn around?

A. Yes, sir.

46 Q. How many feet wide was it?

A. I don't know; guessing at it I would say eight or ten feet; I don't know how wide these cars are.

Q. How wide was the stall?

A. There were two stalls from the door back and divided in half from the door back.

Q. There was one stall in the other end?

POOR COP

A. Yes, sir.

Q. You don't know anything about the condition of these horses when they came to Hinton?

A. No, sir.

By the Court:

Q. Did any agent or representative of the defendant Company, the Chesapeake & Ohio Railway Company, ever make any objection to you, or, so far as you know, to Squire Larew, as to the form of the notice which you gave to them.

(To which question counsel for the defendant objected.)

A. No, sir; I never heard of any.

Q. Did any agent or representative of the C. & O. Railway Company negotiate with you to any extent with reference to this claim? I don't want you to tell what the negotiations were.

(To which question counsel for defendant objected.)

A. Yes, sir.

Q. Do you know what Mr. Robb, the agent at Seebert, did with the paper or account or claim you filed with him?

A. No, sir; I do not.

47 Q. Was Mr. Robb present and did he see the injured leg of the horse which you have testified about at the time the car was unloaded?

A. I cannot state positively whether it was—whether he was at the car or not, but he was there after he came in the stock yard. I think Mr. Robb was in the car, but he was certainly there after the horse was put in the stock yard or pen.

Q. Did he place this notation on this freight receipt "1 horse badly damaged", after he had seen the horse and seen his leg?

A. Yes, sir.

Recross-examination by Mr. Fitzpatrick:

Q. Did you send any one at all with this shipment?

A. No, sir.

Redirect examination by Mr. F. R. Hill:

Q. Will you please describe to the jury just how this partition was made in the car?

A. We aimed to make it like a stall in a stable, so there was no way to get hurt, as far as we knew. We knew he would butt around a good deal and we aimed to make it strong. It was inch lumber; I don't remember positively, but I think it was oak.

Q. Was it sound lumber?

A. Yes, sir.

Q. How was this partition fastened to the car?

A. Pieces nailed up each side, and the planks were nailed to these pieces and a piece nailed to the roof and to the floor and nailed in the middle to these planks.

48 Q. What were the sizes of the pieces of timber that were nailed to the sides of the car and the piece of timber put up in the center?

A. I think 2 x 4—I don't remember; but they were nailed to the sides and the boards nailed to them.

Q. Was it sound timber?

A. Yes, sir.

Q. Was this a quiet colt?

A. Yes, sir.

S. E. McNeel, another witness of lawful age, being first duly sworn, deposes and says:

Direct examination by Mr. Hill:

Q. Where do you live?

A. Close to Millpoint.

Q. What is your occupation?

A. Farmer.

Q. Where were you on the 13th day of February?

A. Lexington, Ky.

Q. Who were you with?

A. Mr. McLaughlin and Dr. Arbuckle.

Q. Were you present when a car of horses belonging to the plaintiff, Mr. McLaughlin, was shipped from Lexington?

A. Yes.

Q. Did you help them load?

A. Yes, sir.

Q. Tell the jury how they were loaded in the car?

A. Three of the horses were decked off; we made stalls for them and the other two went in between them and the two mares

49 went together. We didn't stall them.

Q. What were the sizes of these stalls?

A. I don't know; I don't know how big the car was. It took about two-thirds of the car to put the three horses in; we stalled off may be a little more. They had good roomy stalls.

Q. Did they have room to turn around in the stalls?

A. I expect they could.

Q. As I understand, there were two stalls in the car?

A. Yes, sir, and one in the other end.

Q. About what space was between these two partitions?

A. Five or six feet I suppose, something like that.

Q. How were these partitions constructed?

A. They were made out of oak lumber, nailed, with uprights 2 x 4.

Q. How close were the boards put together?

A. I suppose the bottoms were not over three or four inches,—two or three inches,—something like that; tolerable close at the bottom.

Q. How high were they?

A. As high as my head.

Q. Did you see the colt that was injured?

POOR COP

A. Yes, sir.
Q. Did you see him when he was loaded?
A. Yes, sir.
Q. What was his condition then?
A. Good.
Q. Was this a quiet colt?
A. Yes, sir; I led him from the sale yard with an old mare; I led him with a halter beside her, and I suppose she was.

49½ (To which answer the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Q. What experience, if any, have you had in handling horses?
A. Some,—all my life.
Q. Had you bought some horses in Kentucky, on this occasion?
A. Yes, sir; two.
Q. What was that colt worth when he was shipped from Kentucky?

(To which question the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. Down there, or after he was shipped up here?
Q. I mean when he was loaded on the car?
A. I told Mr. McLaughlin I thought he ought to be worth $150 or $200.

(To which question the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court defendant, by counsel, then and there excepted.)

By the Court:

Q. Just what, in your opinion, was he worth?
A. I think that he was worth that.

Mr Hill, continuing:

Q. Did you see this horse after he arrived at Seebert?
A. Yes, sir.
Q. Do you remember the date he arrived at Seebert?
A. Yes, sir, on the 17th, I think.
50 Q. What was the condition then?
A. Not worth anything then, I didn't think.
Q. Why?
A. I didn't think he had but three legs.
Q. What was wrong with the fourth?
A. It was knocked off.
Q. Explain to the jury how that horse was injured?
A. He had the whole side of his hock knocked off.
Q. Do you remember which leg?
A. I think the right leg; I would not be positive.

Q. Did you see the car of horses before they were unloaded?
A. No, sir; I was not in the car.
Q. How soon after they were unloaded, did you see them?
A. As soon as they came up out of the pen; I was there at the depot when they came out. I brought my horse out there.

Cross-examination by Mr. Fitzpatrick:

Q. Whereabouts on the leg was he hurt?
A. On the outside of the hock.
Q. On the right leg?
A. I think so.
Q. When did you see the colt last?
A. I didn't see him from the 17th day of February until the sale this fall.
Q. Did you see him then?
A. I didn't pay any attention to him then.
Q. Did you see him?
A. Yes, sir.
Q. How did he walk,—without a limp?
A. I didn't pay much attention to him.
51 Q. Did you realize it was the same horse as you had seen before?
A. Yes.
Q. How was he sold?
A. At auction, I think.
Q. Whereabouts?
A. Right close to Academy.
Q. Do you know what he brought?
A. No, sir.
Q. You say his leg was knocked off? Did you mean that?
A. That is what I thought about it; it was cold weather.
Q. I didn't ask you what you thought; I am asking you whether it was a fact?
A. The whole side of it was knocked off.
Q. Was the whole leg knocked off?
A. No, sir.
Q. You mean to say he had an injury on one side?
A. You could see the bone on that side of the leg.
Q. The flesh was knocked off on one side of his leg?
A. Yes.
Q. How long a place was it?
A. I supposed as big as my hand.
Q. If you don't know, don't say so.
A. I suppose four or five inches.
Q. Do you know the veterinarian, Smith?
A. Yes.
Q. Do you know when the horse was turned over to him?
A. No, sir.
Q. Did you buy some horses at Lexington?
A. Yes.

POOR C

Q. Were they shipped in the same train?
52 A. I don't know whether they came on the same train; they were loaded the same evening.
Q. When did they arrive?
A. On the 17th.
Q. Came in in the same train?
A. Yes, sir.
Q. Did you come with them?
A. No.
Q. How many other people were shippers from this locality that day?
A. Just us three.
Q. No one of you sent anybody with your stock?
A. No, sir.
Q. Did you come before your stock left Lexington?
A. I suppose not.
Q. When did you leave Lexington?
A. We left on the 14th, I suppose,—on Saturday evening.

Dr. M. C. SMITH, another witness of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. Hill:

Q. Where do you live?
A. At Millpoint.
Q. What is your occupation?
A. Veterinarian.
Q. How long have you been a Veterinary surgeon?
A. About six years.
Q. Were you called upon to treat a horse for the plaintiff, L. P. McLaughlin, in the month of February, 1914?
53 A. Yes, sir.
Q. Do you recall when you were first called to see this horse?
A. No, sir; I do not.
Q. About what time was it, Doctor?
A. I could not tell you without looking at my book. It was only a few days after he unloaded them.
Q. Have you your book?
A. No.
Q. Tell the jury in what condition you found this horse?
A. His right hind leg had been brused and cut from the hock to the ankle, something like six or seven inches, to the bone.
Q. What did you do for the horse?
A. I treated him the best I could and got him cured up.
Q. Did you treat him in the usual manner as such injuries are treated by a Veterinary Surgeon?

(To which question the defendant, by counsel, objected, and the Court sustained the objection.)

Q. Tell the jury how you treated the horse?

A. I treated him there at Mr. McLaughlin's about a week or ten days and taken him to my place and kept him, I think, about two months, or two and one-half.

Q. What did you do in the treatment of him?

A. His leg had to be dressed each day, the same as any bad wound.

Q. How do you mean by dressed—what do you mean?

A. Take off the bandage and clean it up and put another one back.

Q. Is that the way injuries of that sort are usually treated?

54 A. Yes, sir.

Q. Will you describe the wound as particularly as you can to the jury? Where it was located and all about it?

A. It was on the left hind leg, started about two inches below the hock joint and went within an inch of the ankle joint. It had been rubbed,—it looked to me like it had been rubbed, and in that way all the skin and tissue *sluffed* off and left the bone. I run my finger clear around the bone, clear along.

Q. Have you had any experience in handling horses?

A. Yes, quite a bit.

Q. What was this horse worth before he was injured—without this injury what would the colt be worth?

(To which question the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. I would not know exactly what to say about that. Of course, the breeding of the horse and all makes him more valuable. I would think though, before he was hurt, the kind of horse he was, that he would have been worth something like $300, anyway.

(To which answer the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Q. After the injury what was he worth?

(To which question the defendant, by counsel, objected,

55 and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. I bought him for $110.00, after it was all over with.

Q. Did the horse entirely recover?

A. He has a blemish that will always be there.

Q. To what extent is he blemished?

A. It will spoil the sale of him, I would say, half or more in value; probably more than half his value.

Q. When did the injury heal?

A. It was not entirely healed when he was taken away from my place—I could not say. It must have been four months, if not longer, from the time it was done before it was healed up.

POOR

Q. Is this a quiet colt?
A. Yes, sir.
Q. How was he when you were first called to see him?
A. He seemed a little nervous then, as though he had been handled very rough.
Q. What sort of a horse is he?
A. He is a sorrel, one white hind foot, star in *forward*, and will weigh about 900 lbs. or nine and a half.
Q. Do you know anything about his breeding?
A. I have a little of it; he is bred from Morgan Chief,—I won't say for sure; I have the card, but never looked at it close.
Q. Saddle or driving horse?
A. Saddle horse.
Q. Is he a standard bred horse?
A. Yes, sir.

56 Cross-examination, by Mr. Fitzpatrick:

Q. You bought him, I believe?
A. Yes.
Q. Paid $110.00 for him?
A. Yes, sir.
Q. At the time you bought him he was not lame in that hind leg, was he?
A. He halts some; he doesn't particularly limp, but it gives him an awkward stride.
Q. Is the horse a gelding?
A. No, sir.
Q. Are you using him for breeding purposes?
A. No, sir; nothing so far.
Q. Is he a stallion?
A. Yes, sir.
Q. That is the purpose for which you expect to put him?
A. No, sir; I will tell you, really when I bought him I had no real purpose in view what I would do with him.
Q. Did I understand you to say the horse was hurt in the left hind leg?
A. Yes, sir.
Q. On the inside of the hind leg?
A. Yes.
Q. On the inside of the leg?
A. Yes.
Q. You are certain about that?
A. Yes.
Q. You are a Veterinarian?
A. Yes.
Q. Graduate from what school?
57 A. Ontario, Canada.
Q. How long have you been practicing?
A. Six years.
Q. Been here six years.

OPY

A. Yes, sir; born and raised here.
Q. On the day you saw this horse, 13th February, 1914, were they just then being taken out of the car?
A. I could not say as to the date, but they were unloaded in February; I could not say what time.
Q. On that day were they then just being taken off the car?
A. They had been taken out when I saw them.
Q. You didn't see the car they were taken out of?
A. No, sir.
Q. You had never seen the colt before that day?
A. No.
Q. You don't know how he had been handled?
A. No, sir.
Q. Or anything else about him?
A. No.
Q. Did you ride him?
A. We had used him a little; I have a small boy that has rode him a few times.
Q. You say he is a Morgan?
A. No, sir.
Q. I thought you said he was a Morgan?
A. He is bred from Borboun Chief.
Q. How many hands high is he?
A. I never measured him; I would say 14½ or 15. He is a good-sized colt for his age.

By the Court:

Q. How old is he?
A. Two years, last spring.

58 EDGAR MCLAUGHLIN, another witness of lawful age, being first duly sworn, deposes and says:

Direct examination by Mr. Hill:

Q. Where do you live?
A. Hillsboro.
Q. This County?
A. Yes, sir.
Q. Are you acquainted with Lee McLaughlin?
A. Yes, sir; a brother.
Q. Where were you on the 17th of February, last?
A. I don't know.
Q. Do you recollect when your brother, Lee McLaughlin, had a shipment of horses arrive from Kentucky?
A. Yes.
Q. Did you help unload them?
A. Yes.
Q. Did you see the car before they were taken out?
A. Yes.
Q. How many horses were in the car?

POOR C

A. I think Mr. McNeel had some horses in the car; I think he had taken his out when I got there; I don't know whether his was in that car or not.

Q. What was the condition of the car when you saw it?

A. I don't know; I think it was all right; I don't know whether there were some partitions tirn down in the car or not. They said one of the horses had been in a partition to itself, but he was with the other horses, and I do not remember whether the boards were in the car or not.

Q. Were any of the horses injured?

A. Yes; he was a colt.

59 Q. What aged colt?

A. Yearling colt, I guess.

Q. How was the horse injured?

A. His hind leg was rubbed; the flesh was rubbed off.

Q. Do you know which hind leg it was?

A. No, sir.

Q. Have you had any experience in handling horses?

A. Yes, sir, a little bit.

Q. What would that colt have been worth had he not been injured?

(To which question the defendant, by counsel, objected, and the Court sustained the objection.)

Q. What was the colt worth without the injury?

(To which question the defendant, by counsel, objected, and the Court overruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. I don't know; I expect $200.00, I guess.

(To which answer the defendant, by counsel objected, and the Court sustained the objection.)

Q. What experience have you had in handling horses—in dealing with horses?

A. I have had a good deal; I have handled them all my life.

Q. Have you bought and sold horses?

A. Yes.

Q. About how many?

A. I don't know.

Q. About how many?

A. I expect 50; I don't know how many; maybe more.

60 Q. How old are you?

A. Thirty two.

Q. What, in your opinion, was this colt worth before he was injured?

(To which question the defendant, by counsel, objected, and the Court overruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. He was worth $200.00.

COPY

Q. What, in your opinion, was he worth after the injury?

(To which question the defendant, by counsel, objected, and the Court overruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. I don't know what he was worth; I would not have wanted to give much for him.

(To which answer the defendant, by counsel, objected, and the Court overruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Q. In your opinion, what was he worth?
A. About $50.00.

Cross-examination by Mr. Fitzpatrick:

Q. You didn't see the colt until it was delivered at Seebert?
A. No, sir.

61 H. A. ROBB, another witness of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. Hill:

Q. Where do you live?
A. Seebert.
Q. What is your occupation?
A. Agent and operator for the Chesapeake & Ohio Railway Co.
Q. Where were you in February, 1914?
A. At Seebert.
Q. What was your occupation at that time?
A. Operator and Agent.
Q. Will you please take the paper which I hand you, marked "Exhibit Two," filed in this case, and tell the jury who signed that paper?
A. That is the handwriting of the helper, Livesay.
Q. Who was Livesay?
A. He was a helper at that time in the depot,—my assistant.
Q. Wrote the words "1 horse badly damaged"?
A. He must have written the same in there; it is not my handwriting.
Q. Did you see the horse that was injured?
A. Yes.
Q. When did you first see him?
A. I seen him immediately after he was unloaded out of the car.
Q. By whose direction did Livesay make that notation?
A. I presume by mine, my direction, of course.
Q. In the month of February, 1914, who was the General Claim Agent of the C. & O. Railway Company at Richmond?
A. L. L. Scherer.

Q. Did Mr. McLaughlin, the plaintiff, file with you any
62 claim for damages on account of injury to this horse?

A. I would not exactly call it a claim; he filed some papers with me.

POOR C

Q. Take the paper I hand you and tell the Court and jury whether this is a copy of the paper he filed with you?
A. I could not say, but to the best of my recollection I believe it is.

(The paper referred to by the witness is "Exhibit Three," heretofore filed.)

Cross-examination by Mr. Fitzpatrick:

Q. You told him at the time that that would not be a sufficient basis for a claim and he would have to file something else?
A. Yes, sir; I called him on the 'phone and told him there was not sufficient papers filed to support the claim.
Q. Was that the same day he had filed this with you?
A. No, sir; that was, if I am not mistaken, two or three days after the shipment of horses arrived.
Q. Did he then or after file anything else with you?
A. No, sir; I just laid this other paper aside.
Q. That was the last you heard of him?
A. Yes, sir.
Q. After you advised him the papers were not sufficient to support the claim?
A. Yes, sir.
Q. Who did you say was the helper?
A. Livesay.
Q. Where is he?
A. The last report I had he was in the Hinton hospital.
Q. You do not know where he is now?
A. No, sir.
63 Q. What was his business? What did he do as helper?
A. I reckon you would call it a little bit of everything.
Q. He worked around the station?
A. Yes; he is what the railroad calls a helper.

Redirect examination by Mr. Hill:

Q. What other papers did you request Mr. McLaughlin to file?
A. Well, according to the Railroad Company's rules, a claim is supposed to be supported by the original B/L, and in that case we would have had to have had the uniform live stock contract, besides the papers filed with me.
Q. Is it not a fact that the papers you requested him to file, in addition to the paper which he did file, was the uniform live stock contract and freight bill?

(To which question the defendant, by counsel, objected, and the Court sustained the objection.)

Q. What additional papers did you request him to file?
A. Didn't I just tell you; I said the original uniform live stock contract.

COPY

F. T. LAREW, another witness of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. Hill:

Q. Where do you live?
A. Hillsboro.
Q. Do you hold any official position in this County?
A. Justice of the Peace.
Q. Were you a Justice of the Peace in the month of February, 1914?
64 A. Yes.
Q. During that month, at the instance of Mr. L. P. McLaughlin, the plaintiff in this case, did you address a letter to L. L. Sherer, General Claim Agent of the C. & O. Ry. Co.?
A. I did. I don't know the exact date, but I wrote to Mr. Sherer.
Q. Did you receive an answer to that letter?
A. Yes.
Q. Will you please take the paper which I hand you, marking the same "Exhibit Four," and tell the Court and jury whether or not that is the answer that you received from Mr. Sherer to your letter?
A. Yes, sir.

(Counsel for plaintiff here introduced "Exhibit Four," which is a letter from L. L. Scherer, General Claim Agent of the Chesapeake & Ohio Railway Company, dated March 13th, 1914, addressed to Mr. F. T. Larew, J. P., Academy, W. Va., to the introduction of which exhibit counsel for the defendant objected.

By the Court: The jury may consider this letter simply for the purpose of showing whether or not the General Claim Agent objected to the form in which the claim was presented to him, but not for the purpose of showing what the negotiations were, looking to a settlement of that claim.

To which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Counsel for the plaintiff here reads to the jury the letter, "Exhibit Four," which is in the words and figures following:

65 "The Chesapeake & Ohio Railway Company.

The Chesapeake & Ohio Railway Company of Indiana.

Claim 74989, Desk-8.

RICHMOND, VA., March 13th, 1914.

Mr. F. T. Larew, J. P., Academy, W. Va.

DEAR SIR: We wish to refer to your favor of February 26th in reference to claim in favor of L. P. McLaughlin for $100.00. If you will let us have the bill of lading and the freight bill covering this shipment we will be glad to go into this matter and make settle-

POOR C

ment without delay. With the information which you have furnished us, however, we are not in position to investigate the claim.

Yours truly,

L. L. SCHERER,
General Claim Agent."

H. A. H.-Mc."

Cross-examination, by Mr. Fitzpatrick:

Q. How many letters did you write Mr. Scherer?
A. One or two—one, I think.
Q. When?
A. I don't just remember; one or two.
Q. When you wrote to him, did you send anything else with your letter?
A. I think I sent him a copy of the account that was made out.
Q. That was all?
A. I think so.
Q. The claim had been placed in your hands for suit or adjustment by the owner of it, Mr. McLaughlin?
A. Yes.
66 Q. You have seen the account, have you?
A. I think so.
Q. If you sent anything with your letter, that is what you sent, did you?
A. It might not have been just in that shape, but it — the substance; it is the amount and what is was for; probably I copied it myself.
Q. Do you remember how long before you received this letter from Mr. Scherer that you wrote to him?
A. No, sir; I do not.
Q. I hand you a paper and ask what it is?
A. Maybe I cannot tell you. (Witness takes paper) I wrote that to Mr. Scherer. That is all the account I sent him, I suppose; I just wrote him a letter and told him about it.
Q. What is that paper which I have just handed to you?
A. It was a letter to Mr. Scherer; intended for a letter.
Q. Written by whom?
A. By me.
Q. What date does it bear?
A. February 26th.
Q. What year?
A. 1914.
Q. Having seen that letter and having refreshed your memory, you are now of the opinion this is the only account you sent to Mr. Scherer?
A. I think so.
Q. In other words, when you wrote to him about this claim which you were handling for Mr. McLaughlin, you simply copied in your letter the claim?
A. Yes.

COPY

Q. And that was all to it?
67 A. I think so; I suppose from that letter it was all I sent him.
Q. You do not know anything about the horse?
A. Not a thing.

Here the plaintiff rested his case.

68 *Defense.*

Thereupon, the defendant, upon its behalf, introduced the following evidence:

H. A. ROBB, a witness of lawful age, being first duly sworn, testified as follows:

Direct Examination, by Mr. Fitzpatrick:

Q. You have been on the stand before today?
A. Yes, sir.
Q. You are the agent of the C. & O. Railway Company at what point?
A. Seebert.
Q. In this County?
A. Yes, sir.
Q. Were you acting in such capacity in the monrh of February, 1914?
A. Yes, sir.
Q. Do you remember about the receipt of a shipment of horses from somewhere in Kentucky for Mr. McLaughlin, about which this case is?
A. Yes.
Q. I hand you a paper and ask you what it is?
A. Uniform live stock contract.
Q. Is that such a contract as is issued by the Chesapeake & Ohio Railway Company to shippers of stock?
A. Yes, sir.
Q. I will ask you whether you, as Agent at Seebert, or your helper, has any authority, and, if so, what authority, to change that contract or vary the terms of that contract?

69 (To which question the plaintiff, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the plaintiff, by counsel, then and there excepted.)

A. None, whatever.
Q. Do you remember on what day it was that the stock came in at Seebert?
A. February 17th; arrived there at 1:45 p. m.
Q. Do you remember who was the conductor?
A. Conductor Courtney.

POOR COP

P. C. COURTNEY, another witness of lawful age, being first duly sworn, testified as follows:

Direct Examination, by Mr. Fitzpatrick:

Q. You have been sworn?
A. Yes, sir.
Q. In whose employ are you now?
A. C. & O. Railway Company.
Q. In whose employ were you in the month of February, 1914?
A. C. & O. Railway Company.
Q. What is the nature of your employment?
A. I am local freight conductor.
Q. Running on what part of the line?
A. Greenbrier District, Hinton Division.
Q. Do you know the station, Seebert?
A. Yes.
Q. Is that in the part of the C. & O. territory that you run on?
A. Yes.
70 Q. Was it in the month of February, 1914?
A. Yes, sir.
Q. The testimony here indicates that on the 17th day of February, 1914, the local freight train on the Greenbrier Division brought a car load of horses to Seebert, consigned to L. P. McLaughlin, the plaintiff in this case. I will ask you what time in the day would that local freight train get there?
A. It is due there about twelve o'clock, but it does not arrive always at the same time.
Q. It would be somewhere about twelve or a little after?
A. Yes, sir; I think it was about two or three; I am not sure.
Q. Were you running as conductor on that train at that time?
A. Yes, sir.
Q. Tell the jury whether or not you had charge of that train from Ronceverte to Seebert?
A. Yes, sir.
Q. As conductor, I will ask you to tell the jury whether or not that train was handled between Ronceverte and Seebert with ordinary care and reasonable diligence on the part of the train crew?
A. Yes, sir; it was.
Q. Why do you say that? Do you remember how it was handled?
A. Yes; that day we only had occasion to cut the engine loose once between Ronceverte and Seebert; and that was to set off a car of mules at Kiester; that was the only occasion I had to cut the engine off and the only time I had occasion to cut the engine off between Ronceverte and Seebert.
Q. How far from Ronceverte is Seebert?
A. 49 miles.

71 Cross-examination by Mr. Hill:

Q. Are you speaking from a record or from memory?
A. I have the record, but I haven't them with me; I am speaking from memory, and I have record also.

Q. Have you refreshed your memory from that record since February?

A. Yes, sir.

Q. When?

A. I was summoned in this case once before and I got those records all together.

Q. When was that?

A. Last Spring sometime, I think, it was I was summoned in this case.

Q. Have you refreshed your memory from the record you kept since last spring?

A. I don't think I have.

Q. What time did your train leave Ronceverte?

A. About seven o'clock.

Q. You came into Seebert from two to three hours late?

A. Yes—No, I don't know that we were two or three hours late; we were some late; it is a rare thing we are ever on time.

Q. Did you not state you were due at Seebert at noon?

A. Yes.

Q. Did you not state you arrived there at 2:30?

A. Somewhere along in the afternoon.

Q. You have no recollection as to the time you did arrive?

A. No, sir; I didn't keep any record of that.

Q. Might it not be a fact that you arrived there at half past three?

A. Yes; it might be a fact; I think the agent has a record of all of that.

72 Q. On that day was your train wrecked?

A. No, sir.

Q. Do you keep a record of the fact that you handle your trains carefully?

A. Yes, sir.

Q. You keep that sort of a record?

A. Yes; we keep a record when it is handled in any other way. I didn't make any exception to the manner in which it was handled that day. When it is handled in any other way, except in a careful manner, we make a record of it.

Q. Did you make an examination of the horses?

A. I didn't look at the horses; the car was fastened and I didn't open it. I do not have a right to open it unless I have reason to believe that there is something wrong inside.

Q. Did you make an examination of this car when you left Ronceverte?

A. Yes, sir; outside.

Q. If you made an outside examination, it being a stock car, you could very easily determine the condition?

A. It was not a stock car; it was a box car.

Q. You are sure of that fact?

A. Yes.

Q. The doors were all fastened?

A. Yes; with a little piece open so they could get air in there

Q What was the size of the car?

POOR COPY

A. I don't know.
Q. What was its number?
A. I haven't that record now.
Q. What was its initial?
A. C. & O.
73 Q. It was a C. & O. car?
A. Yes, sir.
Q. Do you know what time this car arrived at Ronceverte?
A. No, sir.

W. F. YAGO, another witness of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. Fitzpatrick:

Q. In whose employment are you now?
A. C. & O. Railway.
Q. In whose employ were you in February, 1914?
A. Same Company.
Q. What were you doing at that time?
A. Freight conductor.
Q. Running between what points?
A. Between Hinton and Clifton Forge.
Q. I will ask you to state whether or not you handled a car load of horses out of Hinton, C. & O. 3013?
A. Yes, sir.
Q. Do you know what the car contained?
A. It was billed as horses.
Q. Where did you pick it up?
A. In Hinton Yard.
Q. Brought it to Ronceverte?
A. Yes.
Q. I will ask you to say whether or not between Hinton and Ronceverte that car was handled by your train with reasonable care and ordinary diligence?

74 (To which question the plaintiff, by counsel, objected, and the Court sustained the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

Q. How long have you been in the railroad business?
A. I have been with the C. & O. 24 years.
Q. How long have you been running as a conductor or in some capacity on freight trains?
A. Sixteen years.
Q. I will ask you to state whether, in your opinion, this car 3013 was handled by your train from Hinton to Ronceverte with reasonable care and ordinary diligence?

(To which question the plaintiff, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court, the plaintiff, by counsel, then and there excepted.)

A. Yes sir. The car was handled unusually carefully, because we didn't make any stop between Hinton and Ronceverte.

Q. Have you your record which shows what time that car left Hinton?

A. Yes.

Q. Please tell the jury when it left Hinton?

A. 1:40 a. m., on the morning of the 17th.

Q. When did you arrive at Ronceverte?

A. I could not say just when. Without stopping it usually takes us about one hour and thirty minutes to make the run.

Q. Do you know anything about the horses, or their condition, in that car?

A. No, sir.

75 Cross-examination by Mr. Hill:

Q. How long did you say you have been a conductor?

A. Sixteen years.

Q. What was the number of your train?

A. No. 98.

Q. How many cars of horses did you have in your train?

A. My record shows I had two cars of horses.

Q. To whom were they consigned?

A. I would not be positive as to who; I never keep a record.

Q. You don't know whether you had a car load of horses in that train for the plaintiff in this case, or not, do you?

A. No, sir; I could not say.

Q. Did you make any examination of either car loads of horses in your train?

A. I did not.

Redirect examination by Mr. Fitzpatrick:

Q. Refer to your record and tell the jury whether or not you hauled in your train car C. & O. 3013, covered by the B/L which has been introduced by the plaintiff in this case?

(To which question the plaintiff, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the plaintiff, by counsel, then and there excepted.)

Recross-examination by Mr. Hill:

Q. Let me see your record, please, Mr. Yago?

(Witness hands counsel Hill the record.)

—. What was the number of the other car that had horses?

A. Wabash 75772.

76 H. T. WALKER, another witness of lawful age, being first duly sworn, testified as follows:

Direct examination by Mr. Fitzpatrick:

Q. In whose employ are you?

A. C. & O. Railway Company.

POOR CO

Q. In what capacity?
A. Railroad Clerk.
Q. In whose office?
A. L. L. Scherer's, General Claim Agent.
Q. I hand you a letter which has been heretofore identified by the witness, Larew, and will ask you to say when it was received in your Richmond office, and when it came into your hands as Record Clerk?
A. On February 28th, 1914.
Q. Is that the time it came into your hands?
A. Yes, sir.
Q. When was it, as is apparent from the face of the letter, received, first?
A. February 27th; there is one stamp on here—I think I can account for that. Very often, after the day's work is over, the mail boy will bring down the next day's mail and it comes to me next morning.
Q. Your stamp shows the 28th?
A. Yes.
Q. This letter was received by you in due course, was it?
A. Yes, sir.

(Counsel for defendant here offers in evidence letter referred to, signed F. T. Larew, J. P., addressed to L. L. Scherer, G. C. A.,
77 Richmond, Va., dated February 26th, 1914, marking same for identification "Exhibit Five.")

Q. Did you keep a record of the time that all complaints come in to the office of the Claim Agent of the C. & O. Railway Company?
A. Yes, sir.
Q. I will ask you to say, from your record, when was the first complaint received by the office of the Claim Agent of the Chesapeake & Ohio Railway Company at Richmond, made by L. P. McLaughlin, in the year 1914, and the month of February?
A. February 28th, 1914.
Q. You are refreshing your memory from what?
A. Taken from my record book.
Q. Made at that time?
A. Yes.
Q. Is that a sheet from the original book?
A. Yes, sir.
Q. Made by whom?
A. By my assistant.
Q. Under your direction?
A. Yes, sir.
Q. What does the record show there?
A. "L. P. McLaughlin—received 1914, Foreign freight, Claim Agents No. 74989, Desk 8, $100.00."

Cross-examination by Mr. Hill:

Q. Did you answer this letter?
A. The only thing I do in answer to a claim is to send an ac-

knowledgment card, quoting our number and the amount and the date received.

78 Q. Who is the General Claim Agent of the Chesapeake & Ohio Railway Company?

A. L. L. Scherer.

Q. You work in his office?

A. I do.

Q. Will you please take this paper which I hand you and tell the jury what it is, the paper being marked "Exhibit Four"?

A. This seems to be a letter written by H. A. H., his full name is Harden, one of the investigators.

Q. In whose department is H. A. H.?

A. L. L. Scherer.

Q. Is he in Mr. Scherer's employ?

A. Yes.

Q. A member of his office force?

A. Yes.

Q. Does he attend to answering communications such as Mr. Larew's letter was?

A. Yes, sir, after the claim passed through my hands. They go to the several investigators and I have nothing more to do with them after they leave my office. Desk 8 handles all claims under that Desk, and the only thing I do is to acknowledge receipt of the claim.

Q. Do you know why this investigator was so long in answering Mr. Larew's letter of February 26th, which was received at the office on February 27th, 1914?

(To which question the defendant, by counsel, objected, and the Court over-ruled the objection, to which action and ruling of the Court the defendant, by counsel, then and there excepted.)

A. No, sir.

79 J. M. PARKER, another witness of lawful age, being first duly sworn, deposes and says:

Direct examination by Mr. Fitzpatrick:

Q. In whose employ were you in the month of February, 1914?

A. C. & O. Railway.

Q. What were you doing?

A. I am stock-pen foreman at Hinton stock yards.

Q. What are your duties?

A. To unload and feed and water stock; it is also a shipping point and feeding point.

Q. Do you remember, in the month of February, 1914, receiving C. & O. 3013, loaded with horses for Seebert, consigned to L. P. McLaughlin?

A. Yes, sir.

Q. What did that reach Hinton?

A. The car arrived at Hinton stock yards at 12:15 a. m., February 2d and 16th day—second month and 16th day.

POOR CO

Q. You say they arrived at 12 o'clock midnight,—12:15 midnight. What did you do with them?

A. I unloaded them and fed them and watered them.

Q. Where did you unload them to?

A. To the stock pens; I unloaded I think five horses and I unloaded them in three different pens.

Q. When did you load them again?

A. At 9 p. m. the same date, at night, 2/16.

Q. What do your duties require you to do in the way of examination of stock for injuries when you unload them?

A. I am supposed to examine all stock that comes there and note the condition of them.

Q. What did you have to do?

80 A. I have to unload stock and feed it and water it; I have to examine it and check it.

Q. When you examine it and check it, then what do you do with regard to your records of the condition?

A. I make a notation on my stock book as to the condition of stock,—good or bad, legs broken, or what.

Q. Were you personally there when these horses were unloaded?

A. Yes, sir.

Q. I will ask you to tell the jury whether or not you did give them an examination and look them over?

A. I did.

Q. When did you reload them?

A. At nine o'clock that night, the same date, p. m., 9 p. m.

Q. You kept them there in the stock yards from midnight all day until the following evening?

A. Yes, sir.

Q. Did you supervise the reloading of them?

A. Yes. There were only two men working there at the same time.

Q. Who else was there with you?

A. A boy that works with me; we were the only two that were there.

Q. When you examined them, what did you find, if anything, the matter with them?

A. I didn't find anything wrong with them; they were in good condition.

Q. They were in good condition when you loaded them at Hinton?

A. Yes, sir; of course, I don't know anything about them after they left Hinton.

Q. Did you say, I don't remember, that these horses were in C. & O. 3013?

81 A. Yes, sir. Box car, I think; I am pretty sure of it.

Q. In what shape, I mean so far as being separated from each other, were the horses when they came under your supervision at Hinton?

A. The stalls were all down and the horses all together.

Q. When you reloaded them at Hinton, what did you do?

A. There was a stallion in the lot. I stalled him in one end and the other horses seemed to be a little ill.

Q. What was the matter with the other horses you were talking about?

A. I put him in the pen; he was ill-tempered. He was inclined to kick; I put him in a separate pen; put the stallion in the other pen—I made three pens in all.

Q. That was the way they were loaded when you last saw them?

A. Yes.

Cross-examination by Mr. Hill:

Q. How long have you been in the employ of the C. & O. Railway Company?

A. Going on eleven years.

Q. In what capacity have you been with them?

A. Stock pen foreman all that time.

Q. What time did you unload these horses on the morning of February 16th?

A. 12:15,—I unloaded them immediately after they came.

Q. Did you keep a record of it?

A. Yes.

Q. How many separate compartments had been in this car?

A. I think there has been two; at least, I think there had been one stall; there was a stall down; I am certain about the two.

82 Q. Didn't you see all the horses together?

A. Yes, sir.

Q. If that be a fact, all the stalls were down?

A. Yes, all of them were.

Q. They had the appearance of having been down for sometime?

A. I don't know; I believe they did.

Q. The boards were all off the stalls, were they not?

A. Yes, sir.

Q. The stallion was loose in the car with the other horses?

A. Yes, sir.

Q. Is it not a fact that there had been two stalls in one end of the car and one in the other end?

A. I knew there had been one stall; I don't know about the other stalls.

Q. As a matter of fact, didn't the upright pieces that were nailed to the side of the car clearly indicate that there had been three stalls in the car?

A. I don't remember that.

Q. You didn't take any note of that?

A. I don't know that I did especially; I don't remember noticing it.

Q. You carefully looked at the horses?

A. Yes, sir.

Q. So that none of them had been injured?

A. No, sir.

Q. You put them in three different stock pens?

A. Yes, sir.

POOR COP

Q. Why did you do that?

A. One was a stallion and the other seemed to be a little fractious with the other horses.

83 Q. What two did you put together?

A. I put the stallion in one pen and the young horse in one pen and the others to themselves.

Q. When you reloaded this car or these horses, did you restore the stalls?

A. Yes.

Q. Did you use the same lumber?

A. I think I made a new stall in one end; I used part of the same lumber; part of the lumber was kicked to pieces.

Q. You could have used it?

A. No, sir; I got new lumber for a good deal; I built one entirely new and I used one as far as it went. The lumber was kicked to pieces in the stall.

Q. What sort of lumber was it?

A. Pine lumber, I think.

Q. What kind of lumber did you put in?

A. I could not say; I think I put a 2 x 4 in, and I don't know what the other pieces were.

Q. What sort of boards did you use in constructing the stalls?

A. I could not say. The Company usually has pine; I don't know what I used that night.

Q. Did you remember the fact that you had put in new stalls?

A. I made a notation to that effect in my book.

Q. Didn't the Railroad Company charge when they re-stalled a car?

A. No, sir.

Q. How much lumber did you use in re-stalling this car?

A. I don't know; probably—the car is 8 ft. wide, and I used probably—I don't know; I cannot say for certain; I used enough to make sufficient stalls, as I thought; it would be probably three or four pieces; may be five pieces; of course, I cannot say. They were sufficient stalls to hold the horses and I have built many a one.

84 Q. Did you feed these horses?

A. Yes, sir.

Q. Made a report of that, didn't you?

A. I put it on my feed bill to forward on with the horses. I keep a record of it.

Q. Have you the record with you?

A. Yes, I have an exact copy of the way-bill and the notation on the way-bill was as to the condition of the horses when received.

Q. When was this copy made?

A. It was made last night.

Q. From what was it made?

A. From my copy.

Q. Where is your copy?

A. In the office in a record book.

Q. Why didn't you bring it up here?

A. I could not bring it here; I only had one book.

OPY

Q. What was the notation you made on your copy?
A. "All stalls down, and all horses together."
Q. When did you make that notation on your copy?
A. At the time I loaded the horses; at the time I fed the horses and loaded them.
Q. You also made a notation you say that they were in good condition?
A. Yes.
Q. You stated that this lumber out of which these stalls had been constructed had been kicked to pieces?
A. I suppose it had been kicked to pieces.
Q. Who took it out of the car?
A. The boy and myself—the boy who works with me.
85 Q. You don't know how much new lumber you used?
A. I do not; I used what was needed for an ordinary stall and patched up what was needed for the others.
Q. You do say you used part of the old lumber in constructing one of the stalls?
A. Yes, as far as it went.
Q. You say it was pine lumber?
A. I am not sure—I think it was; I think it was soft lumber.
Q. On that occasion, did you unload another car of horses?
A. We unloaded a car of mules for L. P. McLaughlin, for Anthony, I believe, that night, and I think we also had three cars for this Division that night and a car of two mules for Seebert, I believe, for Mr. McNeel or Neel; I am sure there were three cars that night for the Greenbrier Division.
Q. Did you unload them all?
A. Yes. I don't know whether I unloaded them all or not; sometimes I don't unload them when they are properly stalled and can be fed.
Q. As a matter of fact, didn't you just unload three horses out of this car and left the horses in the end stalls?
A. No, sir; we unloaded them all, out in three separate pens.
Q. How many pens have you in the yard?
A. 25, in use; that was my statement awhile ago that they were in three different pens, and it is my statement now.
Q. Was the horse injured when it was re-loaded?
A. No, sir.
Q. You re-loaded them at 9:30?
A. At 9:30 p. m., same day.
Q. Do you know which one of these horses was injured?
A. None injured in the stock yards.

86 Redirect examination by Mr. Fitzpatrick:

Q. Why did you unload them at Hinton?
A. That is the feeding point and we are supposed to unload them without asking any questions; we are required to do it there. We are not supposed to ask any questions; it is not our business to say; that is our instructions. Everything placed there we unload and feed.

POOR COP

(Counsel for defendant here offers in evidence Local Way-Bill made by you. I hand you a paper and ask you what it is?

A. A copy of my way-bill,—feed bill that goes on with the regular way-bill.

Q. Did you make the original?

A. Yes, sir; also made this.

Q. Did you make the original at the time the shipment was made out?

A. Yes, sir.

Q. Why didn't you bring the original?

A. The original is in a book and we have only one and we are handling a lot of stock now and I could not bring it from there.

(Counsel for defendant here offers in evidence Local Way-Bill, which is marked for identification "Exhibit Six.")

And this was all the evidence introduced by the Defendant.

87 Thereupon, the plaintiff, in Rebuttal, offered the following evidence.

L. P. McLaughlin, recalled:

Direct examination, by Mr. Hill:

Q. Did you see the stalls in the car when it arrived at Seebert?

A. Yes, sir.

Q. Who tore the stalls down when the horses were removed at Seebert?

A. There were four or five of us.

Q. Were you there?

A. Yes.

Q. Were there any differences in the stalls when the car arrived at Seebert than when they left Lexington, Kentucky?

A. I could not swear positively; I thought there was not. They looked like they were when we left there.

And this was all the evidence introduced in the case.

88 State of West Virginia,
County of Pocahontas, Towit:

I, W. S. Coursey, Court Stenographer, do hereby certify that the foregoing is a true, correct and accurate transcript of the shorthand notes taken by me in the above styled case of L. P. McLaughlin vs. The Chesapeake & Ohio Railway Company, a corporation, tried at the December Term, 1914, of the Circuit Court of Pocahontas County, West Virginia, and is all the evidence offered on behalf of the plaintiff and the defendant.

I also certify that I was duly sworn to correctly take said evidence in shorthand.

Given under my hand this the 23d day of December, 1914.

W. S. COURSEY,
Court Stenographer.

89 *Plaintiff Instructions.*

No. 1. Refused.

The Court instructs the jury that the defendant in this cause could not lawfully stipulate by special contract or otherwise for exemption from responsibility for the negligence of itself or its servants.

No. 2. Given.

The Court instructs the jury that although they may believe from the evidence that the paper writing dated February 13th, 1914, entitled "Uniform Live Stock Contract" was fairly executed, yet if they believe from a preponderance of the evidence, that the horse in question, in its transportation by the defendant from Lexington, Kentucky, to Seebert, West Virginia, sustained injury, and that said injury was not due to the inherent viciousness of the injured animal, or other animals in the car with it, but that it was the result of the failure of the defendant to use ordinary care and diligence in the transportation of said animal, then they should find for the plaintiff in such amount as they believe from the evidence will compensate the plaintiff for said injury.

No. 3. Given.

The Court instructs the jury that the requirement as to making claim for damages is within the time and in the manner specified may be waived by failing to object to the form of a defective notice or by entertaining and proceeding to consider and negotiate with reference to the claim, and a substantial compliance with the stipulation is all that is required.

90 *Defendant's Instructions.*

No. 1. Refused.

The Court instructs the jury to find for the defendant.

No. 2. Given.

The Court instructs the jury that if they believe from all the evidence in this case that the horse which was injured in this case, while being transported from Lexington to Seebert, was received, at Hinton, in good condition and that it was transported from that point to destination with ordinary care and diligence, then the presumption arises that the said injury was due to proper vice or nature of the animal, and they should find for the defendant.

POOR COP

91 At a Circuit Court continued and held for the County of Pocahontas, at the Court House thereof, on the 4th day of December, 1914, the following order was made and entered of record:

L. P. McLAUGHLIN
vs.
CHESAPEAKE & OHIO RY. COMPANY.

On Appeal.

This day came the parties by their attorneys, and thereupon the defendant tendered its special plea accompanied by duly certified copy of "Uniform Live Stock Contract," under seal of the Interstate Commerce Commission, and the plaintiff objected to the said plea, but the Court overruled the said objection, to which action of the Court the plaintiff excepted, and thereupon the said plea with the aforementioned contract are filed and made a part of the record, and the plaintiff replied generally to said plea, and the plaintiff replied generally to the account filed, and issue was joined, and now came a jury to-wit: David Varner, J. P. Duncan, G. M. Williams, E. W. McNeil, George Beverage, J. F. Arbogast, Charles Grogg, P. D. Moore, W. H. Barlow, Amos Wooddell, Elihu Moore, and Elmer Moore, twelve good and lawful men, duly tried, empannelled and sworn to try the issue joined, and after hearing all the evidence of both the plaintiff and defendant, the defendant moved the Court to direct a verdict for the defendant, but the Court overruled the said motion, to which action of the Court, the defendant excepted. And now after hearing all the instructions of the Court and argument of

92 Counsel, the jury retired to their room to consider of their verdict, and after a while returned into Court, with the following verdict: "We, the jury find for the plaintiff, and assess his damages at $75.00.

W. H. BARLOW,
Foreman."

And thereupon the defendant moved the Court to set aside the said verdict, as contrary to the law and the evidence, as excessive and as contrary to the laws of the United States of America in such case made and provided, but the Court overruled the said motion, and refused to grant the defendant a new trial, and thereupon the defendant moved the Court to enter judgment for the defendant, notwithstanding the verdict of the jury, but the Court overruled the said motion, and the defendant objected and excepted, to the action of the Court in refusing to enter judgment, for it notwithstanding the verdict, and also excepted — the action of the Court in refusing to set aside the said verdict and grant a new trial.

It is therefore considered by the Court that the plaintiff L. P. McLaughlin, do recover of and from the Chesapeake & Ohio Railway Company, a corporation, and the National Surety Company, the name of which is signed to the appeal bond herein, the sum of Seventy-five ($75.00) Dollars, with interest until paid, and costs

accrued before the Justice of the Peace, but each party hereto shall pay his own costs in this Court.

And the defendant the Chesapeake & Ohio Ry. Co., desiring to apply to the Supreme Court of Appeals of the United States, for an Appeal and writ of error to the judgment of this Court, no appeal lying to the Supreme Court of Appeals of West Virginia, in this cause, and there being no other higher State Court, than this,
93 the judgment is stayed for a period of sixty days, in which such application may be made, this Court now refusing to grant such appeal or writ of error.

And the defendant shall have thorty days from the rising of this Court in which to present its Bill of Exceptions, to the Court or the Judge thereof, in vacation.

94 And this was all the evidence introduced on behalf of the plaintiff, and as well the defendant, and at the conclusion of all the evidence as aforesaid the defendant moved the Court to direct a verdict for the defendant, but the Court refused to direct such verdict for the defendant, to which action of the Court the defendant objected and excepted; and thereupon, the defendant moved the Court to enter a judgment for it upon its special plea herein filed but the Court overruled the said motion and the defendant objected and excepted.

The defendant then asked the Court to give to the jury the following instructions, marked "Defendant's Instruction No. 1" and "Defendant's Instruction, No. 2":

"No. 1. The Court instructs the jury to find for the Defendant."

"No. 2. The Court instructs the jury that if they beli-ve from all the evidence in this case that the horse which was injured in this case, while being transported from Lexington to Seebert was received at Hinton, in good condition and that it was transported from that point to destination with ordinary care and diligence, then the presumption arises that the said injury was due proper vice or nature of the animal, and they should find for the defendant."

And the Court gave to the jury Instruction No. 2 and refused to give Instruction No. 1 to which action of the Court in so refusing to give Instruction No. 1 the defendant then and there objected and excepted.

And the plaintiff requested the Court to give instructions marked "Instructions Nos. 2 & 3" as follows:

"No. 2. The Court instructs the jur- that although they may beli-ve from the evidence, that the paper writing dated February 13th, 1914, entitled "Uniform Live Stock Contract," was fairly executed, yet if they believe from a preponderance of the evidence, that
95 the horse in question in its transportation by the defendant from Lexington, Kentucky, to Seebert, West Virginia, sustained injury, and that the said injury was not due to the inherent viciousness of the injured animal or other animals in the car with it, but that it was the result of the failure of the defendant to use ordinary care and diligence in the transportation of said animal, then they should find for the plaintiff in such amount, as they be-

lieve from the evidence will compensate the plaintiff for said injury."

"No. 3. The Court instructs the jury that the requirement as to making claim for damages within the time and in the manner specified may be waived by failing to object to the form of a defective notice or by entertaining and proceeding to consider and negotiate with reference to the claim, and a substantial compliance with the stipulation is all that is required."

And the defendant objected to the said instructions for the reason that Instruction No. 2 fails to take into consideration the terms of the contract dated February 13th, 1914, and known as the "Uniform Live Stock Contract" in evidence in this case, and for other reasons apparent upon the face of the said instruction, but the Court overruled the said objections and gave the said instruction to the jury, to which action of the Court the defendant excepted; and the defendant also objected to Instruction No. 3 for the reason that it told the jury that the defendant Railway Company might, through an unauthorized agent or through any agent waive the terms and stipulations of the Live Stock Contract in this suit involved, but the Court overruled the said objection and gave the said instruction as above set out, and the defendant excepted.

And thereupon the jury after the argument of counsel and after the said instructions were read to them, as above set out, retired to its room to consider of its verdict, and after a while returned into Court with a verdict in the words and figures following, to-wit:

96 "We, the jury find for the Plaintiff and as-ess his damages at Seventy-Five ($75.00) Dollars.

W. H. BARLOW, *Foreman.*

And the defendant moved the Court to set aside the verdict of the jury, and assigned the following reasons:

1. For the reason that same is contrary to the law and evidence.

2. Because improper instructions had been given to the jury by the Court at the instance of the plaintiff over the objections of the defendant.

3. Because proper instructions offered by the defendant had been refused by the Court.

4. Because improper testimony was allowed to go to the jury, as is shown by the testimony incorporated in this Bill of Exceptions and by the objections of the defendant.

5. Because the said verdict is contrary to the law of the United States, as is shown by the Special plea of the defendant filed in this cause and relied upon by the defendant and on which issue was by the plaintiff joined.

6. For other reasons apparent upon the face of the record.

And the defendant also moved the Court to enter judgment for the defendant notwithstanding the said verdict, but the Court refused to enter judgment for the defendant notwithstanding the said verdict, and the defendant objected and excepted; and the
97 Court also refused to set aside the said verdict and to grant the defendant a new trial, to which action of the Court the

defendant objected and excepted and asked that its Bill of Exceptions to all the rulings of the Court, and each of them, as set out therein, may be signed, sealed, enrolled and saved to it and made a part of the record herein, which is accordingly done, this the 31st day of December, 1914.

CHAS. S. DICE, [SEAL.]
Judge, Circuit Court of Pocahontas County, West Virginia.

Filed and made a part of the record this 31st day of December, 1914.

G. W. SHARP,
Clerk, Circuit Court of Pocahontas County, West Virginia.

98 In the Circuit Court of Pocahontas County.

L. P. McLAUGHLIN, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant.

This day, in vacation, came the defendant by its attorney and tendered to the Court its Bill of Exceptions marked "Bill of Exceptions No. 1" in this case, and it appearing to the Court that thirty days have not elapsed since the adjournment of the term at which the judgment herein was taken, and that thirty days have not elapsed since the order was made by the Circuit Court of Pocahontas County, allowing the filing of said Bill of Exceptions, the same having been seen and inspected by the Court, is signed, sealed and made a part of the record and marked for identification "Bill of Exceptions No. 1" and is accordingly certified to the Clerk of the Circuit Court of Pocahontas County, who is hereby directed to enter this order in the current law order book.

Done this 31st day of December, 1914.

CHAS. S. DICE,
Judge of the Circuit Court of Pocahontas County.

99 Know all men by these presents: That we, Herbert Fitzpatrick, for and on behalf of The Chesapeake & Ohio Railway Company, a corporation, as principal and National Surety Company, a corporation, are held and firmly bound unto L. P. McLaughlin the full and just sum of Five Hundred and No/100 dollars, to be paid to the said L. P. McLaughlin, or his certain attorney, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of February, in the year of our Lord one thousand nine hundred and Fifteen.

Whereas, lately at a term of the Circuit Court of Pocahontas County, West Virginia, in a suit depending in said Court, between

J. P. McLaughlin and The Chesapeake nad Ohio Railway Company, a corporation, a judgment was rendered against the said The Chesapeake & Ohio Railway Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said, L. P. McLaughlin, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Chesapeake and Ohio Railway Company, shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation is void; else to remain in full force and virtue.

H. FITZPATRICK, [SEAL.]
For and on behalf of The Chesapeake & Ohio Railway Co.

[SURETY CO.'S SEAL.] NATIONAL SURETY COMPANY, [SEAL.]
By J. W. HAGEN, Jr., [SEAL.]
Attorney-in-fact.

Approved by

EDWARD D. WHITE,
Chief Justice of the United States.

100 STATE OF WEST VIRGINIA,
Cabell County, ss.:

Acknowledged before me by Herbert Fitzpatrick, this the 23rd day of February, 1915.

My Commission expires September 16th, 1921.

SAMUEL BIERN,
[NOTARIAL SEAL.] *Notary Public, Cabell County, West Va.*

STATE OF WEST VIRGINIA,
Cabell County, ss.:

I, Samuel Biern, a Notary Public in and for the County and State aforesaid, do certify that J. W. Hagen, Jr., personally appeared before me in my said County, and being by me duly sworn, did depose and says that he is attorney in fact of the corporation described in the writing hereto annexed, bearing date the 23rd day of February, 1915, authorized by said corporation, to execute and acknowledge bonds and other writings of said corporation; that the seal affixed to said writing is the corporate seal of said corporation and that said writing was signed and sealed by him in behald of said corporation by its authority duly given and the said J. W. Hagen, Jr., acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 23rd day of February, 1915.

My Commission expires September 16th, 1921.

[NOTARIAL SEAL.] SAMUEL BIERN,
Notary Public, Cabell County, W. Va.

101 *Clerk's Certificate.*

STATE OF WEST VIRGINIA,
County of Pocahontas, ss:

I, G. W. Sharp, Clerk of the Circuit Court of Pocahontas County, West Virginia, do hereby certify, that the foregoing is a true transcript, of the record and proceedings in a certain action at law, lately pending in our said Circuit Court, between L. P. McLaughlin, Plaintiff, and the The Chesapeake & Ohio Railway Company, a corporation, defendant, with all things touching the same, except the omissions prescribed by statute, as fully and wholly as they now exist in all the records in my office on file.

Given under my hand this the 6th day of January, 1915.

G. W. SHARP, *Clerk.*

Clerk's Fee for Copy $31.00.

Endorsed on cover: File No. 24,655. West Virginia, Pocahontas County, Circuit Court. Term No. 100. The Chesapeake & Ohio Railway Company, plaintiff in error. vs. L. P. McLaughlin. Filed April 5th, 1915. File No. 24,655.

Supreme Court of the United States

OCTOBER TERM, 1916

No. 100.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION, *Plaintiff in Error,*

versus

L. P. McLAUGHLIN, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF POCAHONTAS COUNTY, STATE OF WEST VIRGINIA.

BRIEF OF ENSLOW, FITZPATRICK & BAKER, COUNSEL FOR THE CHESAPEAKE & OHIO RAILWAY COMPANY.

STATEMENT OF THE PROCEEDINGS.

On the 15th day of March, 1914, L. P. McLaughlin instituted a suit in the County of Pocahontas, State of West Virginia, before F. T. Larew, a Justice of the Peace, for One Hundred dollars, claiming damages to a horse shipped

over the lines of The Chesapeake & Ohio Railway Company, from Lexington, Kentucky, to Seebert, West Virginia. The Chesapeke & Ohio Railway Company appeared and filed a special plea, setting up the fact that the shipment was one in interstate commerce, and controlled by the terms of the bill of lading. On the 21st day of March, 1914, the Justice of the Peace gave judgment for the Plaintiff for One Hundred Dollars, and on the 26th day of March the case was appealed to the trial court for the County of Pocahontas, the Circuit Court of that County. At the December term the case was tried *de novo*, with the result that a verdict was found for the Plaintiff, L. P. McLaughlin, for Seventy-five dollars; and, on the 25th day of February, 1915, the case was brought into this Court by a writ of error.

THE FACTS.

The Chesapeake & Ohio Railway Company is a corporation under the laws of the State of Virginia, doing business in the States of West Virginia and Kentucky. On February 13, 1914, L. P. McLaughlin purchased, for Ninety Dollars, a colt and shipped it from Lexington, Kentucky, to Seebert, West Virginia. It was loaded under the direction of the Plaintiff. It arrived at Seebert, West Virginia, on February 17, 1914, and when unloaded was found to have one of its hind legs swollen and cut (page twenty of the record). Robb, the Station Agent of The Chesaueake & Ohio Railway Company at Seebert, West Virginia, saw the condition of the colt, and a few days later the Plaintiff, McLaughlin, gave to Robb a statement of damage. When told by Robb (page thirty-five of the record) that the papers delivered by him, were not sufficient, McLaughlin, on the 19th or 20th day of February (page twenty-two of the record), turned his claim over to Larew, the Justice of the Peace, with the direction to Larew to forward his claim to the Railway Company. Larew delayed, and the claim was not received by the Railway Company until February 27th (page forty-three of the record). The testimony indicates that the animal, when it arrived at the Station Hinton, West Virginia, was in good condition, and that from Hinton to the point of delivery, the car in which the animal was, was properly handled (pages 40 and 41 of the record). The

Live Stock Contract, or Bill of Lading under which the colt was shipped from Lexington, Kentucky, to Seebert, West Virginia, was filed before the Interstate Commerce Commission (page eleven of the record). The local Agent at Seebert, West Virginia, had no authority to change any of the terms of the Bill of Lading (page thirty-eight of the record). The Bill of Lading or Live Stock Contract provides, as follows:

> "That no claim for damages which may accrue to the said shipper under this Contract shall be allowed or paid by the said Carrier, or sued for in any Court by the said shipper unless claim for such loss or damage shall be made in writing, verified by the affidavit of the said Shipper or his Agent, and delivered to the General Claim Agent of the said Carrier, at his office in Richmond, Virginia, within five days from the time said stock is removed from said car or cars."

A letter mailed at Seebert, West Virginia, February 26th was received in Richmond, Virginia, on February 27th (See page forty-three of the record).

At the conclusion of all of the evidence in this case, The Chesapeake & Ohio Railway Company moved the Court to direct a verdict for it, and further moved the Court to enter judgment on its special plea duly filed. Both of these motions were, however, overruled, and the Court allowed the case to go to a Jury, instructing it, at the instance of the Plaintiff, over the objection of the Defendant, as follows:

INSTRUCTION NO. 2.

> "The Court instructs the jury that although they may believe from the evidence that the paper writing dated February 13th, 1914, entitled 'Uniform Stock Contract' was fairly executed, yet if they believe from a preponderance of the evidence, that the horse in question, in its transportation by the defendant from Lexington, Kentucky, to Seebert, West Virginia, sustained injury, and that said injury was not due to the inherent viciousness of the injured animal, or other animals in the car with it, but that it was the result of the failure of the defendant to use ordinary care and diligence in the transportation of said animal, then

they should find for the plaintiff in such amount as they believe from the evidence will compensate the plaintiff for said injury."

And, also, the following instruction:

INSTRUCTION NO. 3.

"The Court instructs the jury that the requirement as to making claim for damages is within the time and in the manner specified may be waived by failing to object to the form of a defective notice or by entertaining and proceeding to consider and negotiate with reference to the claim, and a substantial compliance with the stipulation is all that is required."

ARGUMENT.

It is urged before this Court that the Circuit Court of Pocahontas County, West Virginia, erred in its interpretation and application of the law in this case, in three particulars:

FIRST—In failing to direct a verdict for The Chesapeake & Ohio Railway Company, upon the conclusion of all of the evidence;

SECOND—In giving, at the instance of the Plaintiff, Instruction Number Two;

THIRD—In giving, at the instance of the Plaintiff, Instruction Number Three.

These will be considered *seriatim*.

FIRST — *The Circuit Court of Pocahontas County should have directed a verdict for The Chesapeake & Ohio Railway Company.*

When McLaughlin sued The Chesapeake & Ohio Railway Company he, of course, assumed the burden of establishing such a case as would entitle him to recover. The suit involving a shipment from Lexington, Kentucky, to Seebert, West Virginia, that recovery could only be, under the terms of the standard form of Live Stock Contract, as filed before

the Interstate Commerce Commission. It was, therefore, a condition precedent to the recovery, that in so far as the terms of that contract placed any affirmative duty upon McLaughlin, it must be complied with, and it must be shown in proof. The testimony here indicates that McLaughlin gave notice upon the arrival of his colt at Seebert to the Station Agent, who had no authority to waive or change the terms of the Live Stock Contract. That Agent told McLaughlin that his proof of claim or assertion of claim was not sufficient, and McLaughlin then turned over to Larew, the Justice of the Peace, before whom the suit was finally brought, his claim against The Chesapeake & Ohio Railway Company, for collection. There cannot be any question, but, as the record stands, such notice was not given as is required by the terms of the Live Stock Contract. If the terms of the Bill of Lading are then binding, it necessarily follows that McLaughlin failed to make his case. If he failed to make his case, then, under the practice in West Virginia—Anderson *versus* Tug River Coal Company, 59 W. Va., 301—the motion to direct a verdict should have been sustained by the Trial Court, or, which amounts to the same thing, judgment should have been entered on the plea of The Chesapeake & Ohio Railway Company setting up the necessity for such notice within the time therein stipulated. It may be contended, however, that the provision of the standard form of Bill of Lading or Live Stock Contract is not a reasonable provision. Consider it for a moment: The underlying purpose of all of the Acts of Congress of the United States with regard to Bills of Lading and Contracts in general between Shippers and Carriers is to see that all shippers, and as well, all carriers, are put upon a common ground, and that the same treatment is guaranteed to all of them. No opportunity must be given to any carrier unfairly to grant favors to any shipper; and, at the same time, the carrier must have the opportunity to protect itself against the assertion of unfounded claims. If a provision which requires practically immediate notice of a claim for damage to live stock be not enforced, then the purpose of this provision in a Bill of Lading is entirely negatived. If the Carrier is to investigate the claim, it must know, and have an opportunity to see, while the effects of the damage are still apparent. So that

this provision is not only reasonable, but it simply carries into effect the general purpose of all such provisions.

SECOND — *The Circuit Court of Pocahontas County erred in giving Instruction Number Two.*

At the conclusion of all of the evidence, at the instance of the Plaintiff, the Court instructed the Jury as follows:

> "The Court instructs the jury that although they may believe from the evidence that the paper writing dated February 13th, 1914, entitled 'Uniform Live Stock Contract' was fairly executed, yet if they believe from a preponderance of the evidence, that the horse in question, in its transportation by the defendant, from Lexington, Kentucky, to Seebert, West Virginia, sustained injury, and that said injury was not due to the inherent viciousness of the injured animal, or other animals in the car with it, but that it was the result of the failure of the defendant to use ordinary care and diligence in the transportation of said animal, then they should find for the Plaintiff in such amount as they believe from the evidence will compensate the Plaintiff for said injury."

This instruction, on its face, is a binding instruction, and practically said to the Jury that the terms of the Live Stock Contract, in evidence before them, had nothing whatever to do with the case. The recovery, under it, is based entirely upon the negligence of the Defendant carrier. It is now submitted to the Court that such an instruction, directing a verdict for the Plaintiff, cannot be properly given, unless it puts before the Jury all of the facts which can effect a recovery. It is well established that in negligence cases, a binding instruction which fails to take into consideration the contributory negligence of the Plaintiff as a fact to be considered by the Jury, is erroneous, and that when given that action alone of a Trial Court is sufficient to reverse. McCreery against Ohio River Railroad Company, 43 W. Va., page 117.

Now, as a matter of principle, it is equally conclusive as to this instruction. Aside from other defects which may exist in it, it should have said to the Jury that if they believed that the Plaintiff, McLaughlin, had complied with the

terms of such Live Stock Contract, and that the Defendant was negligent, and that by reason of such negligence the injury to the animal was occasioned, then there could be a recovery; but, in this particular case, the Jury was told that the Live Stock Contract is of no effect, and that it may treat the shipment exactly as though it had not been executed.

THIRD — *The Circuit Court of Pocahontas County erred in giving Instruction Number Three, which reads as follows:*

> "The Court instructs the Jury that the requirement as to making claim for damages is within the time and in the manner specified may be waived by failing to object to the form of a defective notice or by entertaining and proceeding to consider and negotiate with reference to the claim, and a substantial compliance with the stipulation is all that is required."

The theory of this instruction is that the terms of the contract between the Shipper and the Carrier could be waived. If this be the true theory of the law, the standard form of Live Stock Contract as filed before the Interstate Commerce Commission, is a mere formality. This Court held in the Chicago & Alton Railway Company *versus* Kirby, 225 U. S., 155, that a carrier might not make a special contract with a particular shipper. That case is based on the broad principle that there must be no discrimination in favor of a particular shipper. That, however, would be rendered of no avail, if the terms of the contract of shipment may be waived by the parties to it. In Georgia, Florida & Alabama Railway Company *versus* Blish Company, 241 U. S., page 190, the Court says:

> "But the parties could not waive the terms of the contract under which the shipment was made, pursuant to the Federal Act, nor could the Carrier by its conduct give the shipper the right to ignore these terms, which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy

of the Act and open the door to the very abuse at which the act was aimed."

Here is a reasonable provision. Reasonable, because it is intended to guard against fictitious claims. It cannot be contended that the terms of the Live Stock Contract, which provided that notice should be given to the carrier, at the office of the General Claim Agent, at Richmond, Virginia, and that no claim should be allowed unless the claim was made in writing verified by the affidavit of the shipper, delivered to the office of the General Claim Agent in Richmond, Virginia, within five days from the time the said stock was removed from the car. The provision was known to the shipper, because he turned his claim over to the Justice of the Peace after the insufficiency of the claim had been called to his attention by the Agent of the Carrier, with direction that it should be forwarded to the General Claim Agent of The Chesapeake & Ohio Railway Company, at Richmond, Virginia. The animal arrived at Seebert, West Virginia, on the 17th, notice of injury to it should have been in the hands of the General Claim Agent by the 22nd of February, 1914. It was not there at that time.

It may seem harsh to say that a matter of five days difference should cause the loss of a claim. A discussion of that, however, would go to the merits of this case, and it is urged that even on the merits of the case, as disclosed by the testimony here, the Plaintiff failed entirely to show negligence on the part of the Carrier. Coming back, however, to this provision of the Bill of Lading, it is now submitted that under the decisions of this Court, the provision is a fair one, and its enforcement means that the Circuit Court of Pocahontas County has erred.

For these reasons, it is respectfully submitted that this Honorable Court should now enter such judgment as the Circuit Court of Pocahontas County should have entered, or should reverse the judgment in this case and remand it to the Circuit Court of Pocahontas County for further proceedings.

HERBERT FITZPATRICK,
F. B. ENSLOW,
Counsel for The Chesapeake & Ohio Railway Company.